# REPORTS

OF

Cases Argued and Determined

IN THE

# COURT of CLAIMS

OF THE

# STATE OF ILLINOIS

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VOLUME 17

**Containing cases in which opinions were filed and orders of dismissal entered, without opinion, between July 1, 1947, and June 30, 1948.**

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SPRINGFIELD, ILLINOIS
1948

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**[Printed by authority of the State of Illinois.]**

# PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 18 of an **Act** entitled "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named," approved July **17, 1945.**

EDWARD J. BARRETT,

*Secretary of State and Ex Officio Clerk of the Court of Claims.*

# OFFICERS OF THE COURT

## JUDGES

ROBERT P. ECKERT, JR., *Chief Justice,*
Freeport, Illinois

WM. WIRT DAMRON, *Judge,*
Harrisburg, Illinois

CLARENCE N. BERGSTROM, *Judge,*
Chicago, Illinois

GEORGE F. BARRETT, *Attorney General*

**EDWARD J.** BARRETT, *Secretary* of *State and Ex-Officio Clerk* of *the Court*

BELLE P. WHITE, *Deputy Clerk,*
Springfield, Illinois

# RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

Adopted pursuant to "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named." (Approved July 17, 1945. L. 1945, p. *660.)*

## TERMS OF COURT

Rule 1. The Court shall hold a regular session at the Capital of the State on the second Tuesday of January, May and November of each year, and such special sessions at such places as it deems necessary to expedite the business of the Court.

## PLEADINGS

Rule 2. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as is herein otherwise provided.

Rule 3. The original and five copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause together with a proper designation of the pleading printed or plainly written thereon.

Rule 4. (a) Cases shall be commenced by a verified complaint which shall be filed with the Clerk of the Court. A party filing a case shall be designated as the clainiant and the State of Illinois shall be designated as the respondent. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) Only a licensed attorney and an attorney of record in said case will be permitted to appear for or on behalf of any claimant, but a claimant, although not a licensed attorney, may prosecute his own claim in person. All appearances, including substitution of attorneys, shall be in writing and filed in the case.

(c) The complaint shall be printed or typewritten and shall he captioned substantially as follows :

IN THE COURT OF CLAIMS OF THE
STATE OF ILLINOIS

A. n.,
Claimant
vs.
No.
STATE OF ILLINOIS,
Respondent

Rule 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal. and if so presented, he shall state when, to whom, and what action was taken thereon.

(b) The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested : that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition: that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true.

(c) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

Rule 6. (a) A bill of particulars, stating in detail each item aiid the amount claimed on account thereof, shall be attached to the complaint in all cases.

(b) Where the claim arises under the Workmen's Compensation Act or the Occupational Diseases Act, the claimant shall set forth in the complaint all payments, both of compensation and salary. which have been received by him or by others on his behalf since the date of the injury ; and he shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

Rule 7. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the complaint.

Rule 8. If the claimant die pending the suit the death may be suggested on the record. and the legal representative, on filing a duly authenticated copy of the record of appointment as executor or administrator. may be admitted to prosecute the suit by special

leave of the Conrt. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

Rule 9. Where any claim has been referred to the Court by the Governor or either House of the General Assembly, any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, as aforesaid, the Court may determine the case upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the case may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

Rule 10. A clainiant desiring to amend his complaint, or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

Rule 11. The respondent shall answer within thirty days after the filing of the complaint, and the claimant shall reply within fifteen days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail so to answer, a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

**EVIDENCE**

Rule 12. At the nest succeeding term of court after a case is at issue, the Court, upon call of the docket, shall set the same for hearing.

Rule 13. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the nest succeeding regular session of the Court.

Rule 14. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent, except in cases arising under the Workmen's Compensation and Occupational Diseases Acts.

Rule 15. If either party fails to file the evidence as herein required, the Court may, in its discretion, proceed with its determination of the case.

Hule 16. All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or case pending before the Court shall be prima facie evidence of the facts set forth therein; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS

Kule 17. The claimant in all cases where the transcript of evidence exceeds tweiity-five pages in number shall furnish a complete typewritten or printed abstract of the evidence, referring to the pages of the transcript by numerals on the margin of the abstract. The evidence should be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

Rule 18. When the transcript of evidence does not exceed twenty-five pages in number the claimant may file the original and five copies of such transcript in lieu ot typewritten or printed abstracts of the evidence, otherwise the original and five copies of an abstract of the evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court and case. together with the name and address of the attorney filing the same printed or plainly written thereon.

Rule 19. Each party may file with the Clerk the original and five copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a mitten notice and five copies to that effect.

Rule 20. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days after all evidence has been completed and filed with the Clerk, unless the time for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later

than thirty days after the filing of the brief and argument of the claimant, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Upon good cause shown further time to file abstract, brief and argument or a reply brief ot either party may be granted by the Court or by any Judge thereof.

Rule 21. If either party shall fail to file either abstracts or briefs within the time prescribed by the rules, the Court may proceed with its determination of the case.

EXTENSION OF TIME

Rule 22. Either party, upon notice to the other party, may make application to this Court, or any Judge thereof, for an extension of time for the filing of pleadings, abstracts or briefs.

MOTIONS

Rule 23. Each party shall file with the Clerk the original and five copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the Court and case, together with the name and address of the attorney filing the same printed or plainly written thereon.

Rule 24. In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained. the claimant shall have thirty days thereafter within n-hich to file petition for leave to amend his complaint.

ORAL ARGUMENTS

Rule 25. Either party desiring to make oral argument shall file a notice of his intention to do so with the Clerk at least ten days before the session of the Court at which he wishes to make such argument.

REHEARINGS

Rule 26. A party desiring a rehearing in any case shall, within thirty days after the filing of the opinion, file with the Clerk the original and five copies of his petition for .rehearing. The petition shall state briefly the points supposed to have been overlooked' or misapprehended by the Court.. with proper reference to the particular portion of the original brief relied upon, and with authorities and snggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

Rule 27. When a rehearing is granted, the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition, and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

Rule **28.** When a decision is rendered against a claimant, the Court, within thirty days thereafter, may grant *a* new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground €or granting a new trial.

**RECORDS' AND CALENDAR**

Rule **29.** (a) The Clerk shall record all orders of the Court. including the final disposition of cases. He shall keep a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof.

(b) Within ten days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the cases set for hearing, and of the cases to be disposed of-at such session, and deliver a copy thereof to each, of the Judges and to the Attorney General.

Rule **30.** Whenever on peremptory call of the docket any case appears in which no positive action has been taken, and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such case should not be dismissed for want of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the nest regular session after the entry of such order, such case may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper showing made by the claimant the Court may, in its discretion, grant an estension of time under such rule to show cause. The fact that any case has been continued or leave given to amend, or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of this rule. The Court may, during the sec-

ond clay of any regular session, call its docket for the purpose of disposing of cases under this rule.

FEES AND COSTS

Rule **31.** The following schedule of fees shall apply:

Filing of complaint (except cases under the Workmen's Compensation Act and the Occupational Diseases Act). . . . . $10.00

Certified copies of opinions :

| | |
|---|---|
| Five pages or less. . . . . | $ **0.25** |
| For more than five pages and not more than ten pages. . | 0.35 |
| For more than ten pages and not more than twenty pages . . . . . | 0.45 |
| For more than twenty pages,. . . . . | 0.50 |

Rule **32.** Every claim cognizable by the Court and not otherwise sooner barred by law,* shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases.

ORDER OF THE COURT

The above and foregoing rules were adopted as the rules of the Court of Claims of the State of Illinois on the 11th day of September, **A.** D. 1945, to be in full force and effect from and after the first day of November, **A.** D. 1945.

* See limitation provisions of specific statutes, including Workmen's Compensation and Occupational Diseases Acts.

# COURT OF CLAIMS LAW

AN ACT *to create the Court of Claims, to prescribe its powers and duties, and to repeal an act herein named.*

Section **1.** The Court of Claims, hereinafter called the Court, is created. It shall consist of three judges, to be appointed by the Governor by and with the advice and consent of the Senate. one of whom shall be appointed chief justice. In case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the nest meeting of the Senate, when he shall nominate some person to fill such office. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

Section **2.** The term of office of each judge first appointed pursuant to this Act shall commence July **1, 1945** and shall continue until the third Monday in January, **1949,** and until a successor is appointed and qualified. After the expiration of the terms of the judges first appointed pursuant to this Act, their respective successors shall hold office for a term of four years from the third Monday in January of the year **1949** and each fourth year thereafter and until their respective successors are appointed and qualified.

Section 3. Before entering upon the duties of his office, each judge shall **take** and subscribe the constitutional oath of office and shall file it with the Secretary of State.

Section **4.** Each judge shall receive a salary of $4,000.00 per annum payable in equal monthly installments.

Section **5.** The Court shall have a seal with such device as it may order.

Section 6. The Court shall hold a regular session at the Capital of the State beginning on the second Tuesday of January, May and November, and such special sessions at such places as it deems necessary to expedite the business of the Court.

Section 7. The Court shall record its acts and proceedings. The Secretary of State, ex-officio, shall be clerk of the Court, but may appoint a deputy, who shall be an officer of the Court, to act in his stead. The deputy shall take an oath to discharge his duties faithfully and shall be subject to the direction of the Court in the performance thereof.

The Secretary of State shall provide the Court with a suitable court room, chambers and such office space as is necessary and proper for the transaction of its bnsiness.

Section 8. The Court shall have jurisdiction to hear and determine the following matters :

A. **All** claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency.

B. All claims against the State founded upon any contract entered into with the State of Illinois.

**C.** All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of **$2,500.00** to or for the benefit of any claimant. The defense that the State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course of their employment shall not be applicable to the hearing and determination of such claims.

D. All claims against the State for personal injuries or death arising out of and in the course of the employment of any State employee and all claims against The Board of Trustees of the University of Illinois for personal injuries or death suffered in the course of, and arising out of the employment by The Board of Trustees of the University of Illinois of any employee of the University, the determination of which shall be in accordance with the substantive provisions of the Workmen's Compensation Act or the Workmen's Occupational Diseases Act, as the case may be.

E. All claims for recoupment made by the State of Illinois against any claimant.

Section 9. The Court may:

**A.** Establish rules for its government and for the regulation of practice therein ; appoint commissioners to assist the Court in such manner as it directs and discharge them at will ; and exercise such powers as are necessary to carry into effect the powers herein granted.

B. Issue subpoenas to require the attendance of witnesses for the purpose of testifying before it, or before any judge of the Court, or before any notary public. or any of its commissioners, and to require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it. In case any person refuses to comply with any subpoena issued in the name of the chief justice, or one of the judges, attested by the clerk. with the seal of the Court attached, and served upon the person named therein as a summons at common law is served, the

circuit court of the proper county, on application of the clerk of the Court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such Court on a refusal to testify therein.

Section 10. The judges, commissioners and the clerk of the Court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of them.

Section 11. The claimant shall in all cases set forth fully in his petition the claim, the action thereon, if any, on behalf of the State, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of the claim or any part thereof or interest therein has been made, except as stated in the petition; that the claimant is justly entitled to the amount therein claimed from the State of Illinois, after allowing all just credits; and that claimant believes the facts stated in the petition to be true. The petition shall be verified, as to statements of facts, by the affidavit of the claimant, his agent, or attorney.

Section 12, The Court may direct any claimant to appear, upon reasonable notice, before it or one of its judges or commissioners or before a notary and be examined on oath or affirmation concerning any matter pertaining to his claim. The examination shall be reduced to writing and be filed with the clerk of the Court and remain as a part of the evidence in the case. If any claimant, after being so directed and notified, fails to appear or refuses to testify or answer fully as to any material matter within his knowledge, the Court may order that the case be not heard or determined until he has complied fully with the direction of the Court.

Section 13. Any judge or commissioner of the Court may sit at any place within the State to take evidence in any case in the court.

Section 14. Whenever any fraud against the State of Illinois is practiced or attempted by any claimant in the proof, statement, establishment, or allowance of any claim or of any part of any claim, the claim or part thereof shall be forever barred from prosecution in the Court.

Section 15. When a decision is rendered against a claimant, the Court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Section 16. Concurrence of two judges is necessary to the decision of any case.

Section 17. Any final determination against the claimant on any claim prosecuted as provided in this Act shall forever bar any further claim in the Court arising out of the rejected claim.

Section 18. The Court shall file with its clerk a written opinion in each case upon final disposition thereof. All opinions shall be compiled and published annually by the clerk of the Court.

Section 19. The Attorney General, or his assistants under his direction, shall appear for the defense and protection of the interests of the State of Illinois in all cases filed in the Court, and may make claim for recoupment by the State.

Sectioii 20. At every regular session of the General Assembly, the clerk of the Court shall transmit to the General Assembly a. complete statement of all decisions in favor of claimants rendered by the Court during the preceding two years, stating the amounts thereof, the persons in whose favor they were rendered, and a synopsis of the nature of the claims upon which they were based. At the end of every term of Court, the clerk shall transmit a copy of its decisions to the Governor, to the Attorney General, to the head of the office in which the claim arose, to the State Treasurer, to the Auditor of Public Accounts, and to such other officers as the Court directs.

Section **21.** The Court is authorized to impose, by uniform rules, a fee of $10.00 for the filing of a petition in any case; and to charge and collect for each certified copy of its opinions a fee of twenty-five cents for five pages or less, thirty-five cents for more than five pages and not more than ten pages, forty-five cents for more than ten pages and not more than twenty pages, and fifty cents €or more than twenty pages. All fees and charges so collected shall be forthwith paid into the State Treasury.

Section *22.* Every claim cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases.

Section **23.** It is the policy of the General Assembly to make no appropriation to pay any claim against the State, cognizable by the Court. unless an award therefor has been made by the Court.

Sectioii **24.** "An Act to create the Court of Claims and to prescribe its powers and duties," approved June **25, 1917,** as amen'ded, is repealed. All claims pending in the Court of Claims created by the above Act shall be heard and determined by the Court created by this Act in accordance with this Act. All of the records and property of the Court of Claims created by the Act herein repealed shall be tnrned over as soon as possible to'the Court created by this Act.

# TABLE OF CASES REPORTED IN THIS VOLUME


A

| | PAGE |
|---|---|
| Auto Electric Company., | 20% |
| Ayres, Minnie. Sister. Et Al | 193 |

B

| | |
|---|---|
| Bohannon. Dorsie L | 90 |
| Boston. Grover C | 175 |
| Breed. Frank H | 198 |
| Brown, Harold R. and Alice I | 79 |
| Buhman, H. E | 132 |
| Burton, Effie May | 155 |

C

| | |
|---|---|
| Cairns, Charles O | 65 |
| Cairns, Josephine V., Widow, Et Al | 65 |
| Casstevens, Lucille | 211 |
| Chicago, First National Bank of | 1 |
| Childers, Della, Widow, Et Al | 84 |
| Childers, George B | 84 |
| Clark, Kathryn S | 117 |
| Cool, S. G. Co., A Corp | 138 |
| Cooper, Arminta | 211 |
| Corcoran, Della N. Widow, Et Al | 86 |
| Corcoran, Edward J | 8G |
| Cornale, Lena, Widow, Et Al | 129 |
| Cornale, Matthew M | 129 |

D

| | |
|---|---|
| Dean, Lovell. Widow. Et Al | 72 |
| Dean. Warren L | 72 |
| Devine. R. P | 211 |
| Domianus, Harry J | 197 |
| Doty, C. R | 68 |

E

| | |
|---|---|
| Eggert, William | 43 |
| Ericson. Melvin B | 1 |

F PAGE

Feely. Leone, Mother. Et Al ..... 34
Feely. Ruth O ..... 34
Feigel. J. R. Co., The ..... 211
Fesser, Jeannette ..... 182
Feutz. Frank C ..... 211
Fogleman. Dorothy. Widow. Et Al ..... 50
Fogleman, Glen ..... 50
Fredrickson. Dolores A ..... 97
Fredrickson: George T ..... 97
Fredrickson. Helen F.. Widow. Et Al ..... 97
French. J. B., Co ..... 1

G

Galloway, Allen ..... 140
Gorman, Jennalyn, Widow. Et Al ..... 92
Gorman, Richard G ..... 92

H

Hartmann-Clark Bros. Co ..... 99
Hayward, Henry ..... 159
Hayward, Lucille, Widow, Et Al ..... 159
Hediger. John T ..... 95
Hediger. Mary L. Widow. Et Al ..... 95
Heller. Myrtle H ..... 114
Hieronymus, Clarence R ..... 45

I

Illinois Oil Company ..... 132

J

Jackson, E. C ..... 132

K

Koerner, Gilbert E ..... 125
Kraft. Jeanne ..... 207

L

Lamb. Forrest G ..... 172
Lane. Larue ..... 165
Laux, Mary E. Lane ..... 23
Layman, Claudia ..... 61
Lindeberg, Ford B ..... 52

Mc

McNutt, Ada ..... 18

M PAGE

MacLeod, Malcolm ..... 167
Marine Transit Co., A Corp ..... 190
Martin, Revy M ..... 78
Mason. Betty Healy ..... 149
Messersmith, Alden ..... 184
Mulder, John. Et Al ..... 1
Myers, William B., Jr ..... 55

N

Newman, Lawrence H ..... 187
Nowak, Anton. ..... 203

P

Parker, Hobert. ..... 211
Paterno. Anthony J ..... 211

Q

Quigley, John P ..... 27

R

Reinertson, Richard ..... 10

S

Sandford, Etna ..... 211
Schuemann, 13. C ..... 132
Schultz, Walter F ..... 193
Sealock, Louis Glenn ..... 32
Sippel, John H. ..... 162
Sippel, Louise J., Widow, Et Al ..... 162
Soper, Elizabeth ..... 152
Spelman and Doty ..... 68
Spelman, Leo, Et Al ..... 68
Stih, Charles and Theresa ..... 30

T

Tomasheski, John B ..... 143

V

Vernon Oil Company ..... 48

W

Wilmette, First National Bank of ..... 1
Wilson, Harry ..... 74
Wilson, James ..... 120

## Y

PAGE
Young, Charles W. . . . . 123

## Z

Zimmerman, Mary Faye. . . . . 177
Zimmerman, Robert B., Et Al. . . . . 177
Zimmerman, Robert B., Jr. . . . . 177

# CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 2654—Claim denied as to John Mulder, et al.)

JOHN MULDER, RECEIVER OF THE RECORDS, BOOKS, AND ASSETS OF THE J. B. FRENCH CO., A FORMER ILLINOIS CORPORATION; THE FIRST NATIONAL BANK OF CHICAGO, ASSIGNEE CREDITOR, AND MELVIN B. ERICSON, RECEIVER OF THE FIRST NATIONAL BANK OF WILMETTE, CREDITOR ASSIGNEE, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 13, 1939.*

*Motion of Claimant to dismiss as to First National Bank of Chicago allowed December 18, 1947.*

*Dismissed for want of prosecution as to Receiver of First National Bank of Wilmette January 13, 1948.*

POPPENHUSEN, JOHNSTON, THOMPSON and RAYMOND, FLOYD E. THOMPSON, ALBERT E. JENNER, JR., and THOMAS F. DONOVAN of counsel, for claimant.

JOHN E. CASSIDY, Attorney General and GLENN A. TREVOR, Assistant Attorney General, for respondent.

4

COURT OF CLAIMS—*Receivers, Collateral attack—Court of Claims not proper tribunal to sit in review upon the validity of the appoint: ment, nor pass upon the validity of the appointment of Receiver by a court of conapetent jurisdiction, in a collateral attack made thereon.*

*Stockholders or Creditors of Dissolved Corporation.*

RECEIVERS—where there has been no enlargement of the 'powers of Receivers by legislative enactment, they have such rights of action only, as were possessed by the corporation whose estate they administer.

*Filing of Claim*—Stockholders or creditors of corporation which 'has been dissolved are not permitted to extend time of settlement 'of corporation's affairs beyond the statutory period by delaying the filing of a claim in behalf of said corporation after the statutory limitation of 2 years, and thus, through the medium of receivership, gain rights which could not otherwise be had by the extinct corporation.

LIMITATION—*Filing of Claim by assignee of Corporation*—The assignee of a valid claim, assigned by a Corporation, at a time when it is duly existing under its Charter, may present such claim against the

. State, after dissolution of such Corporation, without regard to the statutory limitation for settlement of corporate affairs.

MR. JUSTICE YANTIS delivered the opinion of the court :

The three claimants of record herein each predicate their claim upon alleged damages originally accruing in favor of J. B. French Company through construction contracts–held by the latter with the State of Illinois. The claim was filed April 16, 1935 for Two Hundred Eighty-four Thousand Four Hundred Forty-one and 93/100 ($284,441.93) Dollars purported damages.

It appears from the claim herein filed that J. B. French Company was formerly an Illinois corporation engaged in the building contracting business; that on October 22, 1929 it entered into a contract with the State of Illinois through the latter's Department of Purchases and Construction, for the erection of certain buildings at the three state hospitals at Lincoln, Elgin, and Dunning, Illinois. The buildings were to be substantially completed by April 22, 1930, and after certain installment payments, final payment was to be made within thirty (30) days after completion, upon written certificate by the supervising architect.

The claim alleges that J. B. French Company began the performance of its work under the contract on October 25,1929 ;that certain delays were caused by respondent and its agents; that respondent failed to keep the subcontracting work up to schedule, whereby expensive winter work became necessary; that J. B. French Company performed all the terms of the contract required on its part except as it was prevented from doing by the wrongful acts and omissions of respondent and its agents ; that claimant tendered the buildings specified in its contract complete as follows: At Dunning in No-

vember, 1930; at Elgin in November, 1930 and at Lincoln in February, 1931; that the State of Illiiiois accepted said buildings and has paid to the J. B. French Company the contract price except for certain agreed deductions and additions thereto, but that it has failed to pay any additional sums due and owing said company for extras and for damages arising out of the acts and omissions of respondent and its agents as described in the claim. *On July 16, 1930 J. B. French Coinpany again executed an assignment* in and by which, according to the complaint, they assigned to Foreman-State National Bank, all sums of money due or to become due J. B. French Company in the State of Illinois under the terms of the latter's contract with the State; *also a further assignment dated July 25, 1930* to the Foreman-State National Bank, of all sums of money due or to become due J. B. French Company in the State of Illinois *for extra work,* labor or materials performed or furnished by said company under its contract with the State. *On September* 30, *1931* copies of these assignments *were sent* by registered mail to the Department of Purchases and Construction of the State of Illinois, receipt whereof was duly acknowledged. The First National Bank of Chicago is by assignment successor to the Foreman-State Bank and is the holder and owner of said assignments. On December 7, 1933 said First National Bank of Chicago recovered a judgment in the Municipal Court of Chicago against said J. B. French Company for Seventeen Thousand Five Hundred Twenty and 01/100 ($17,520.01) Dollars and costs, "said judgment being recovered on a promissory note dated July 25, 1932, made by J. B. French Company and secured by the above described assignments.

On the first day of November, 1930 J. B. French Company executed its promissory note in the sum of Ten

Thousand ($10,000.00) Dollars, payable to the order of the First National Bank of Wilmette. This note was secured by an assignment of all sums due and to become due the J. B. French Company from the State of Illiiiois under the terms of the contract hereinabove described, but subject to the assignments heretofore described in favor of the Foreman-State National Bank. Melvin B. Ericson is the receiver of the First National Bank of Wilmette under appointment made July 25, 1922. The complaint recites that approximately Thirteen Thousand Forty-one and 08/100 ($13,041.08) Dollars was due on said note April 16, 1935.

The J. B. French Company was dissolved as a corporation on June 20, 1932 by decree of the Superior Court of Cook County, and John Mulder was thereafter on April 12, 1935 appointed by the Circuit Court of Cook County, receiver of the books, assets and records of said company.

The order appointing him as receiver of J. B. French Company directed him as such to have this claim prepared and filed in this court and to pursue and collect any further claims or assets for and on behalf of the creditors and stockholders of J. B. French Company.

Respondent has filed a motion to dismiss the claim ,on the following grounds :

1. That the alleged appointment of John Mulder as receiver for the J. B. French Company was void, as having been made more than two years after said corporation was dissolved.

2. That the assignees of a corporation have no better or greater rights than such corporation or any receiver appointed for it.

3. That a corporation after being legally dissolved has no power or authority to execute a promissory note

or to make a valid assignment securing same.

**4.** That no rights could accrue against the State by virtue of the judgment held by the First National Bank of Chicago against J. B. French Company, because the State had contracted with the corporation and had paid the money due under said contract.

5. That from the allegations in the complaint J. B. French Company had breached the contract in not having substantially completed same April **22,** 1930.

6. That it does not appear respondent ever had notice of the assignment to the First National Bank of Wilmette until the filing of this claim, and that copies of the assignments to the Foreman-State National Bank were not sent to respondent until September 30, 1931, which was six months after the "date respondent had paid the money due under the contract", and that respondent therefore is not bound by such assignments.

7. That since the assignment to the First National Bank of Wilmette is only for sums due "under the terms of the Contract", said bank and its receiver could not maintain a claim for extra work, labor or materials for the alleged reason-that such items would not form a part of the contract.

Comprehensive briefs of ninety-four pages by claimant and one hundred two pages by respondent have been filed. The greater part of the Attorney General's brief is devoted to his contention that the appointment of John Mulder as receiver of the records, books and assets of the J. B. French Company was void, and that such receiver therefore has no legal authority to prosecute a claim in this court. This contention is made by virtue of *Par.* 94, *Ch.* **32,** *Illinois' Revised Statutes,* **1933,** which provides that—

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

In the absence of this statute, the existence of the corporation would terminate for all purposes upon the entering of the order of dissolution. Under the terms of the foregoing Act a dissolved corporation has a continued existence for certain purposes for a definite period of two years after its dissolution.

The Attorney General contends that the J. B. French Company was a necessary party to any proceedings for the appointment of a receiver, and that under the statutory limitation of two years neither the corporation, its officers or stockholders could be made a party-defendant except within two years after the dissolution, and that the Circuit Court of Cook County had no authority to appoint a receiver for said company. This court is faced with the fact however that John Mulder was appointed receiver of the books, assets and records of the J. B. French Company on April 12, 1935 by the Circuit Court of Cook County, and we do not consider the Court of Claims of Illinois to be a proper tribunal to sit in review upon the validity of the appointment nor to pass upon the validity of such appointment in a collateral attack made thereon.

*Richards* v. *People, 81 Ill.* 551.
*Commercial Nat. Bank* v. *Burch, 141 Ill.* 519-527.
*Vandalia* v. *St. L. etc. Ry. Co., 209 Ill.* 73-82.

These questions are then presented :

1. Could J. B. French Company validly file a claim in the Court of Claims more than two years after a decree of dissolution had been entered against it?

2. Further; if the J. B. French Company itself could not file a claim under such conditions, could a receiver appointed for such company have any better standing or right, and could such receiver file a claim herein more than two years after the decree of dissolution had been entered as to said company?

3. Whatever the rights of John Mulder, receiver, etc. may be, the question still arises as to the status of the other two creditors who appear here as assignees of the J. B. French Company, under assignments made prior to the time of the latter's dissolution.

No attempt will here be made to review the many decisions cited by counsel on each side upon the first of these questions. We are of the opinion from a careful study thereof. that the two-year limitation was only intended. to aid in expediting the closing up of the corporate affairs after the dissolution of such corporation ; that the J. B. French Company, having been dissolved as a corporation on June 20,1932 could not file a valid claim against the State at the time the instant claim was filed, i. e. on April 16, 1935. Further, that the stockholders or creditors of said corporation 'ought not to be permitted to extend the time of settlement of the corporation's affairs beyond the statutory period by delaying the filing of a claim in behalf of the corporation after the limitation of such two-year period, and thus, through the medium of receivership, gain rights which could not otherwise be had by the extinct corporation. The claim, insofar as it is filed by John Mulder, receiver, etc. herein, recites under Paragraph (e) of the complaint that, "The

claim presented on behalf of J. B. French Company by the foregoing claimant, is a claim against the State of Illinois in the sum of Two Hundred Eighty-four Thousand Four Hundred Forty-one and 93/100 ($284,441.93) Dollars, which sum is justly due and payable to the said J. B. French Company and these claimants, etc., etc.'' No averment as to mho constitutes these creditors, other than the First National Rank of Chicago, assignee, and Melvin B. Ericson, receiver of the First National Bank of Wilmette, assignee, appears in the complaint; the only reference thereto being (p. **13** of the complaint), "Determination of validity and amount of any creditor's claim is to be by the Circuit Court of Cook County."

In determining the status of receivers, the court in the case of *Republic Life Insurance Company* v. *Swigert, et al,* 135 Ill. 150 (167) said :

"We understand the rule to be, that where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for *the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law wath the estate of the corporation, and deriving his own title under and through at, and that, for purposes of litigation, he takes only the rights of the corporation such as could be asserted on its own name, and that upon that basis, only, can he litigate for the benefit of either shareholders or creditors.*"

In the case of *Young* v. *Stevenson,* 180 Ill. 608 (614), the Supreme Court said :

"The powers of the appellant receiver are not defined by statute. They are, therefore, such, only as are conferred by courts of equity, under their equitable jurisdiction, upon receivers appointed by such courts. As receiver he represents the corporate body, and not its shareholders. He succeeds to all rights of action which had accrued to the corporation, but not to rights of action which rested in the shareholders."

We believe the weight of authority sustains the rule in respect to the powers of receivers,-that "Where there has been no enlargement of their powers by legislative

enactment, they have such rights of action only, as were possessed by the corporation upon whose estate they administer."

As to the claim of John Mulder, receiver of the records, books and assets of the J. B. French Company, a former Illinois corporation, herein filed, the motion of the Attorney General to dismiss will be and the same is hereby allowed.

The rights of the First National Bank of Chicago, assignee, and of Melvin B. Ericson, receiver of the First National Bank of Wilmette, assignee, were acquired by them by assignment in the apparent.regular course of business, prior to the dissolution of J. B. French Company. We are not advised of any valid reason why such assignees should not have a right to present against the State within the statutory period of five years from the time the right of action thereon accrued, any claim which they may have acquired by such assignment. The validity of such claim is not.being determined at this time. While we agree with the Attorney General that the State cannot be subjected to a garnishee proceeding, we are of the opinion that the assignee of a valid claim, made by a corporation at a time when it is duly existing under its charter, can prosecute such claim, after the dissolution of such corporation.

The motion of the Attorney General to dismiss the claim in-so-far as same is filed by the First National Bank of Chicago, assignee, and Melvin B. Ericson, receiver of the First National Bank of Wilmette, assignee, is hereby denied.

(No. 3677—Claim denied.)

RICHARD M. REINERTSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion* filed September *12, 1944.*

Opinion *on* Rehearing filed November *12, 1947.*

WILLIAM E. MCNAMARA, for claimant.

GEORGE F. BARRETT, Attorney Genera1 and WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION—Award must be founded upon facts and inferences reasonably drawn from facts proved by the evidence, and cannot be based upon guess or conjecture.

Mt. *Olive Coal Co.* vs. *Ind. Corn.;*374 Ill., 461.

SAME—*degree of proof* required. Where an employee of the Division of Highways, Bureau of Police, sustains accidental injuries, arising out of and in the course of his employment and seeks an award, he must prove his case by a clear preponderance of the evidence as required by law.

SAME—*same*—Disability cannot rest upon imagination, speculation or conjecture; it must be based upon facts established on objective findings; the Court cannot *go* outside the record to find a basis for an award.

White vs. State, 12 *C.* C. R., 249.

SAME—*medical* and hospital services. Under Section 8, Par. "a" of the Workmen's Compensation Act; provides that the necessary medical and hospital services shall be furnished by the respondent but that the employee may at his own expense employ physicians of his own choosing. The respondent herein furnished all medical, hospital and other necessary services to the claimant herein.

Sam%—proof *required* an granting *awards.* Upon Rehearing this Court again held an award cannot be granted on subjective symptoms, no testimony being offered at .rehearing by medical witnesses in reference to objective symptoms.

CHIEF JUSTICE DAMRON delivered the opinion of the court.

This claimant seeks an award for certain medical expenses, compensation for temporary total disability, compensation for the loss of use of his left eye and the right leg, under the Workmen's Compensation Act, and compensation for partial permanent disability.

The record consists of the complaint, filed January 6, **1942,** rule to show cause why said complaint should not be dismissed for want of prosecution, entered by this court on the 14th day of February, **1943,** petition of claimant for reinstatement of said cause, filed December 8, **1943,** order reinstating said cause, dated January **12, 1944,** original transcript of the testimony and abstract of same, filed March **11, 1944,** the report of the Division of Highways, filed April **14,1944,** statement, brief and argument on behalf of claimant and respondent.

The facts are not in dispute. Richard Reinertson was first employed by the respondent on April 6, **1940** at a rate of **$175.00** per month in the Department of Public Works and Buildings, Division of Highways, Bureau of Police. July **1, 1941** the police organization was transferred from the Division of Highways to the Department of Public Safety and reorganized as the Division of Police. The claimant continued in the capacity of police officer at the same salary rate until the time of the accident on which this claim is based.

July **5, 1941,** the claimant was riding a motorcycle furnished him by the Division of Police southward on U. S. Route No. **45** in DesPlaines, Illinois. He was on patrol at the time to which he had been assigned by his commanding officer. Immediately south of Everett Street, at about 1:30 P. M., an automobile operated by one Lyle Martin, of DesPlaines, drove out of the service drive of a gasoline service station across the path on which the claimant was approaching. The automobile collided with the motorcycle which claimant was operating and claimant was thereby injured. He was immediately taken to the Northwestern Hospital in DesPlaines and placed under the care of Dr. H. F. Heller.

On July **7,** the claimant was transferred to St.

Luke's Hospital in Chicago on orders of the division and there was placed under the care of Dr. H. B. Thomas, Professor of Orthopedic Surgery, University of Illinois Medical College. The record discloses that claimant remained under the care and observation of Dr. Thomas and his staff of specialists until April **23,** 1942.

The Division of Police paid claimant's full salary of $175.00 per month during the temporary total disability period, amounting to $402.49. This period was from July 6, 1941 to September **13,** 1941, inclusive. The respondent also paid the following creditors for services rendered the claimant in connection with his injury:

| | |
|---|---|
| Dr. H. F. Heller, DesPlaines.. | $ **5.00** |
| Dr. H. B. Thomas, Chicago | **213.00** |
| Dr. Abraham Ettleson, Chicago.. | **10.00** |
| Dr. C. C. Klement, Chicago | 10.00 |
| Northwestern Hospital, DesPlaines. | **13.00** |

These facts above stated are found in the report of M. K. Lingle, of the Division of Highways.

The claimant was confined to his bed at his home on orders of Dr. Thomas for about two months, at which time he was advised to attempt to work. He returned to his work on September 14. On October 8, he was again examined; on November 7 he was examined and during that time was complaining of dizziness and head pains. On December **1,** 1941, the claimant was reduced in rating from police officer to mechanic, and the salary rate was reduced from $175.00 per month to $125.00 per month. He continued under the care and observation of respondent's doctors who examined claimant at intervals and made reports to respondent. These reports are dated December 15, 1941, January **13,** January 22, February 19 and April **23,** 1942. On April **30,** 1942, the claimant was released from service. On May **11,** 1942 the claimant obtained other employment which paid him $104.00 per

month, and at the time the testimony was taken he was earning $135.00 per month.

The only contested issue in the case is the nature and extent of claimant's injury.

It is the contention of claimant that he was permanently disabled at the time of the accident; that he had concussion of the brain; that his right leg was permanently injured; that his left eye was permanently injured and his vision impaired thereby, and that these conditions exist to the present time and have persisted since July 5, **1941** He claims there is need for further medical services.

Evidence shows that claimant, on his own behalf, visited and employed three doctors in attempting to find out why his alleged conditions persisted, and paid $30.00 to these doctors. He seeks the sum of $500.00 to cover the cost of additional medical attention.

The claimant testified that this injury left him in a condition where he was unable to return to the type of work he was doing before the accident, and has so affected his general condition as to make it impossible for him to do the work necessary to equal his former earnings. He testified that he gets flashes in his eye—has sensation of a light being turned on and off—that he is unable to concentrate—that he cannot read or do close work or work involving detail. That he still has head pains beginning in the back and extending to the right eye and right ear, and there is a sensation of numbness. That there is a dull pain in his head almost constantly. That he has dizzy spells that come frequently when working or walking on the street, and this condition interferes with his ability to work. That he is unable to stand noise, or listen to the radio, if loud, and is obliged to have much more rest than before.

Dr. Robert E. Dyer was called as a witness on behalf of elaimant who testified that he examined claimant for the purpose of testifying in his behalf on June 7, **1943.** He testified he made a complete physical examination of claimant with special reference to his head, where he complained of symptoms of dizziness, pain and numbness. He also made an examination of the eyes with the ophthalmoscope, testing all reflexes and the nervous system, which was to cover the symptoms of which he complained.

He testified that claimant had told him he had pain in the right side of his head, dizziness and disturbance of his eye. Claimant's attorney asked the following question :

> "Q. **At** that time, other than the subjective symptoms he complained **of,** were you able to find any objective symptoms that could cause these difficulties he complained **of?**
>
> **"A. No, I** did not. **I** could elicit tenderness as **I** forcibly pressed on the side of **his** head; not beyond the findings of **a** normal individual."

A hypothetical question was propounded to this witness based solely on the subjective symptoms of claimant which required the witness to use his imagination and assume that the subjective symptoms existed. The question was not proper and the answer mas not helpful to the court.

The rule is well settled that an award, to be sustained, must! be founded upon facts and inferences reasonably drawn from facts proved by the evidence, and cannot be based upon guess or conjecture. *Mt. Olive Coal* Co. v. Ind. *Corn.,* 374 Ill. 461.

Dr. Fred W. Hark, Chicago, was called on behalf of respondent, who testified that he examined and treated claimant on July 7,1941, two days after the accident, and that at the time the claimant had bruises and that claim-

ant's shoulder was his greatest physical disability, "which was probably due mostly to bruises more than any muscle tears, or anything." That he complained of dizzy attacks and symptoms of being drunk. That he found no broken bones in the body, just bruises. The witness testified that claimant also complained of a swelling in the back of his head and he was never able to feel it as claimant described it. That thereafter he saw claimant frequently. That he kept in touch with him. That at times he was present when Dr. Thomas examined claimant. He further testified that the persisting complications claimant had were from the effects of a concussion of the brain. He believed that claimant had headaches and spots before his eyes because that is usually the chief complaint of one who is suffering a concussion. He admitted that the symptoms complained of could have been caused by the injury.

On cross-examination, Dr. Hark testified that claimant was examined by an eye specialist who could not coordinate the subjective symptoms with the accident. That they found no organic basis for those symptoms. This witness would not positively connect the subjective complaints of claimant with the accident.

In the report of the Division of Highways, which is a part of this record, excerpts of reports of Dr. Thomas are set out:

On December 15, Dr. Thomas reported he "examined and talked to officer Richard Reinertson again this morning. He complains a good deal of a sensation of flashes of his left eye. As I told you we had him examined the other day and there was no pathology found in the left eye. He has normal vision in each eye without glasses in spite of a moderate degree of far sightedness. He has an old choroidal scar in the right eye which appears to antedate his injury".

On April 23, 1942, Dr. Thomas reported, "We examined Mr. Reinertson today. Orthopedically he is finished. Neurologically we find nothing. We are dismissing the case".

Giving due consideration and weight to all the eri-deiice in the record, we cannot say that claimant is suffering from any disability as the result of the aforesaid accident. All the testimony of claimant must be judged to be subjective. The medical witnesses find nothing objective. The record shows the case was tried on the subjective claims of the claimant. Further, the medical witnesses were led into a field of $peculation based upon subjective complaints.

This court denied a claim for'compeiisation in *White* vs. *State,* 12 C. *C.* R., **249.** This case was tried on subjective symptoms only. We held, after citing Section 8, paragraph (i) **(3)** of the Workmen's Compensation Act : "Neither claimant's own testimony, nor the medical testimony, shows any objective conditions or symptoms. The evidence 'fails to satisfy the requirements of this section of the Act".

**It** fully appears from this record that claimant has failed to prove his case by a clear preponderance of the evidence, as required by law. Liability cannot rest upon imagination, speculation or conjecture, it must be based upon facts established on objective findings. We cannot go outside the record to find a basis for an award.

This claimant also seeks an award in tlie sum of $30.00 for money expended by him for examination by three physicians of his own choosing. Section 8 **(a)** of the Act provides that the necessary medical and hospital services shall be furnished by the respondent but that the employee may at his own expense employ physicians of his own choosing. All medical, hospital and other necessary services were furnished by respondent to this employee. We also must deny this claim.

Award deniecl.

**DAMRON, J.**

At the September term, **'1944,** we delivered an opinion in the above entitled cause denying compensation to the above named claimant for the reason the claimant had failed to prove by competent evidence, objective conditions or symptoms in reference to his claimed injuries as provided in Section 8, paragraph (i) sub paragraph **(3)** of the Workmen's Compensation Act.

A petition for rehearing was filed by this claimant on October 11, 1944 and thereafter this court granted a rehearing.

On May 29, 1947 additional testimony was taken in support of the complaint at which time Dr. Henry F. Heller was called to testify on behalf of claimant. He testified that he was connected with the Northwestern Hospital at DesPlaines, Illinois and that on the afternoon of July 5, 1941 the claimant was received at said hospital in the first aid room thereof and that he examined the claimant at that time. He stated the claimant had many bruises and abrasions around the body and some on his face and head. The bruises on the head he believed were on the forehead. He further testified that the patient was placed in bed and that further hospital treatment was adrised at his hospital or some suitable place; that two hours thereafter claimant was turned over to doctors for the State and went home.

In response to a question by claimant's attorney this doctor testified that at the time he examined claimant he was suffering from shock and rather dazed, that he talked to him and told him that he had been thrown from a motorcycle. That in his opinion the claimant at that time was suffering from cerebral injury and that was what was causing his dazed and shocked condition.

On cross examination the doctor testified that he had

not examined the claimant since July **5, 1941** and that he did not know whether or not claimant is now suffering from dizzy spells except what claimant told him and further that he had made no organic examination since July 5, **1941.** On redirect examination counsel for claimant read a portion of the testimony claimant had given on the 8th day of October **1943.** The doctor was then asked to assume that this testimony of claimant was true and to give an opinion as to whether or not the subjective symptoms testified to by Claimant at that time could be the result of the accident. He answered that he believed they could come from that accident.

As we said in our original opinion me cannot grant an award on subjective symptoms. No testimony was offered at the rehearing by medical witnesses in reference to objective symptoms.

We had fully considered the testimony of the claimant which was repeated to Doctor Heller and had denied an award. There being no testimony offered as required under the Compensation Act this claim is again denied.

Award denied.

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**(No. 3929—Claim denied.)**

ADA MCNUTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed Apral 24, 1947.*

*Petition of Claimant for Rehearing denied September 18, 1947.*

WAYNE O. SHUEY, for claimant,

GEORGE F. BARRETT, Attorney General, and C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION—*claim under Occupation Diseases Act.* **Where an employee of the Department of Public Welfare seeks to recover compensation under the Occupational Diseases Act of the Slate of Illinois, based on the fact that during the time she worked as an**

attendant at the Jacksonville State Hospital, Jacksonville, Ill., she contracted the disease' of tuberculosis out of and during the course of her employment.

SAME—*same.* This court has held that the State is liable under the provision of Sec. 3 of the Workmen's Occupational Diseases Act, *Marjorie Wheeler* vs. *State* (12 C. C. R. 254) but a claim to be compensable must be based on negligence by the State as defined in Sec. 3.

TO ESTABLISH *NEGLIGENCE— Within the meaning of this section Claimant must prove Respondent Violated:*

1. A rule *or* ,rules of the Industrial Commission made pursuant to the Health and Safety Act, or
2. Violated a Statute *of* this State intended for the protection of the health of employees.

SAME—*same—Par. D of Sec. 8* of *the new Court of Claims Act— is substantially the same us it was in the old act except that it formerly only specified claims to be determined under the provisions of the Workmen's Compensation Act, whereas it now covers claims to be determined under the substantive provision* of *both acts.* The New Court of Claims Act merely confirmed its jurisdiction under Section 3 of the said act by express statutory enactment and the legislature never intended to make an election making employees of the State automatically under the Workmen's Occupational Diseases Act.

**BERGSTROM, J.**

The complaint, which was filed on September 4, 1945, alleges that claimant was employed by the Department of Public Welfare of the State of Illinois in the capacity of attendant at the Jacksonville State Hospital, Jacksonville, Illinois, for the period from February 5, 1935 through the month of April 1944; that in April 1944 claimant was forced to discontinue her employment by reason of the disease of tuberculosis which claimant alleges arose out of, during the course of, and by reason of her employment by respondent. Claimant claims compensation under the Occupational Disease Act of the State of Illinois.

The record shows that claimant was given a physical examination at the time she was employed in 1935, which she satisfactorily passed; that during her employment as an attendant she worked alternately in and out of those

wards handling tuberculosis patients, and that during the period of her employment she spent about two pears in tuberculosis wards. Her duties consisted of supervision of wards and meals, making beds, giving medicine, taking temperatures, giving baths, and serving food.

Her tubercular condition .was first discovered in November, 1941. She was examined again in 1942 and in April, 1944. Claimant continued with her work until her April, 1944 examination, when she was told by Dr. Nady, who was employed by respondent, tliat the old cavity had reopened again. She was put to bed aiid remained there in her home for a period of seven months, until November, 1944. She then went to a hospital in Ottawa, Illiiiois where they collapsed a lung. She mas given a number of X-ray examinations and received treatment by doctors on the hospital staff of Jacksonville State Hospital. By stipulation, the following report made by Dr. R. H. Rundy, Dr. G. H. Vernon and Dr. Andrew Nady, the Advisory Committee on Tuberculosis Control to the Department of Public Welfare, with respect to the case of claimant, was admitted into evidence :

"Based upon the facts that this employee entered the employment of the Jacksonville State Hospital on February 5, 1935, and though there is no report of a medical examination made at the time of her entrance into the service, it is presumed that she was medically qualified for employment. The x-ray taken on 9/16/41 reveals in the right lung in the region of the fourth interspace, anterior, a cavity about 2 c.m. in diameter. This appears to be recent and probably has not been present as long as a year. It is our opinion that the s-ray findings are due to moderately advanced, pulmonary tuberculosis which is active.

"The report from the Institution refers to the fact that this employee was assigned to wards where it is likely patients with tuberculosis were hospitalized.

"It is the judgment of this committee that the presumption is strong that this illness grew out of the patient's employment."

With respect to claimant's present condition, there is a report which was received on October 23, 1946 from

the State Laboratory in Springfield, which reads as follows:

"Dr. J. L. Smith
1201 South Main Stieet
Jacksonville, Illinois

"On August 30th we received a specimen of sputum submitted by you from your patient, Mrs. Ada McNutt. This specimen was injected into a guinea pig at that time. To date this pig has remained well and healthy, and the autopsy on organs was normal. The result of the guinea pig inoculation is, therefore, negative for tuberculosis.

"Culture—No acid fast bacilli were found.

Very truly yours,
/s/ H. J. SHAUGHNESSY,
Chief, Division of Laboratories."

and Dr. Witten testified that from the said report claimant is now able to be gainfully employed.

From the record, the Court is of the opinion that claimant contracted tuberculosis as a result of her employment and had an "occupational disease" within the meaning of Section 6 of the Workmen's Occupational Diseases Act. The sole question remaining for determination is whether claimant is entitled to receive compensation under the provisions of this Act.

Liability would be determined either under Section 4 of the Workmen's Occupational Diseases Act, which provides for an election to come under the Act, or under Section **3** of the said Act. This court has decided that the State is liable under the provisions of Section 3 of the Workmen's Occupational Diseases Act (*Marjorie Wheeler* v. *State*, 12 C. C. R. 254), but that a claim to be compensable must he based on negligence by the State as defined in said Section **3.** To establish negligence within the meaning of this section claimant must show respondent violated:

**(1)** A rule or rules of the Industrial Commission made pursuant to the Health and Safety Act, or

**(2)** Violated a Statute **of** this State intended **for** the protection of the health of employees.

Claimant argues that under Section 4 of the Occupational Diseases Act an employer may elect to provide and pay compensation according to the provisions of the Act by filing notice of such election with the Industrial Commission; that the Court of Claims supplants the Industrial Commission insofar as claims against the State are concerned; that it is impossible for 'the State to file a formal election under the Act, because there is no agency, other than the, legislature, which has the authority to bind. the State by an election. Claimant further argues that the State is either automatically under the Act or automatically excluded from the Act as far as payment of compensation to its employees for diseases arising out of State employment; that the legislature in passing the new Court of Claims Act in effect July, 1945, giving the court jurisdiction of claims for personal injuries or death arising out of and in the course of the employment of any State employees, the determination of which shall be in accordance with the substantive provisions of the Workmen's Occupational Diseases Act, mas in itself an election by the State to pay and provide compensation under the Occupational Diseases Act. Paragraph D of Sectioii 8 of the new Court of Claims Act is substantially the same as it mas in the old Act except that it formerly only specified claims to be determined under the provisions of the Workmen's Compensation Act, whereas it now covers claims to be determined under the substantive provisions of both Acts. This court concluded that it had jurisdiction of claims arising under Section *3* of the Workmen's Occupational Diseases Act *(Marjorie Wheeler* v. *State, supra),* and. the new Court of' Claims Act merely confirmed this by express statutory enactment: To conclude that this was an election by the legislature for the State and to have the same effect as the

election by employers under Section 4 of the Workmen's Occupational Diseases Act, would be construing the Act by reading into it something never intended by the legislature. If the legislature intended to make an election, making employees of the State automatically under the Workmen's Occupational Diseases Act, it is reasonable to assume that it would have done so by amending the Workmen's Occupational Diseases Act by providing as it did in the Workmen's Compensation Act, Section 3, which reads— "The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation * * *". This court has interpreted that section to mean that the Act applied automatically arid without election to the State.

To recover from the respondent under the Workmen's Occupational Diseases Act, claimant must show by the evidence that the State is charged with negligence as defined in. Section 3 of the said Act.

From the record, this claimant has failed to do.

For the reasons stated, an award is denied.

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(No. 3470—Claim denied.)

WARY E. LANE LAUX, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opanion pled June 5, 1947.*

*Petition of Claimant for Rehearing denied September 18, 1947.*

JOSEPH S. PERRY, GEORGE PERRINE and EDGAR J. ELLIOTT, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

DAMAGES. Claimant must establish her case by a preponderance of the evidence in showing her farm and subdivision property on Stanton

Bay near **Fox Lake,** Illinois, **has** been **damaged,** because of an overflow **of** water, **as** a result **of** the construction in 1939 of a dam at McHenry, Illinois.

**DAMRON, J.**

Claimant, Mary E. Lane' Laux, contends that her farm and subdivision property on Stanton Bay near Fox Lake, Illinois, has been damaged to the extent of $15,-600.00 because of an overflow of water thereon as a result of the construction in 1939 of the dam at McHenry, Illinois.

The undisputed evidence shows that claimant is the owner of a farm and certain lots in subdivisions situated within a few hundred feet of Fox Lake about **11** miles south and upstream of the McHenry dam.

In 1939, the old dam was replaced with a new structure. The permanent crest of the old structure at its highest point was **733.9** feet above sea level. A series of four temporary flash boards or planks each about 7½ inches wide were kept above the permanent crest during the summer season to maintain adequate boating depth in the chain of lakes. These flash boards would be removed in the autumn.

The new dam was built to replace the old and deteriorated structure for the purpose of maintaining a more constant mater level. **It** is a concrete and steel structure with a permanent crest **736.40** above sea level and has five vertical by-pass gates to regulate the level and flow of water. Except during heavy precipitations, it has maintained normal water levels in the chain of lakes and has eliminated the previous fluctuations which existed.

Claimant contends that the top level of the new dam is 30 inches higher than the old structure resulting in a8 permanent 30 inch rise in the water level. The record, however, indicates that the present crest of the new

structure is slightly lower than the old dam with its four tiers of flash boards.

Claimant introduced her own testimony and that of other witnesses to the effect that after the dam was constructed in 1939 the water began to overflow and remained over approximately 45 acres of farm land previously used for growing hay and night pasturage thereby preventing her from using or renting the property and greatly impairing its value. She also testified that by reason of similar flooding certain subdivision lots, one of which had been previously filled at considerable cost, had been considerably commercially damaged. It was admitted that prior to 1939 this land would periodically be under water during spring floods but later the water would recede whereupon she could utilize the land. Now, however, the water does not recede entirely and the land is covered with muskrat houses and is worthless.

The testimony on behalf of respondent, corroborated by hydrographic charts, established that the present structure with its head gate section and by-pass gates has eliminated overflows and maintains constant levels except for heavy precipitation. The water was never higher in the new dam and as a rule the water level has been lower since the dam was constructed.

Claimant's theory appears to be that while the new dam has maintained more constant water levels it has operated to prevent the recessions of spring flood water, as in the past, causing higher water to remain throughout the late summer months over that part of her premises previously used for pasturage. The evidence as we view it, included the hydrographic charts, indicates that prior to the new dam the water levels in the chain of lakes, even in late spring and summer months, over

many years was as high, if not higher, than it has been since the old dam was replaced by the new structure; the excessive seasonable fluctuations have been eliminated; and more constant levels have be'en maintained.

The accuracy of this observation is confirmed by the hydrographic record of water levels for the years 1926 to 1942. During the month of June for all these years, the water level was as high or higher during twelve of the thirteen years preceding the construction of the new dam than it was for any of the years subsequent thereto. For July, it was, as high or higher for 8 out of the 12 preceding years; for August it was as high or higher for 9 out of the 12 preceding years and for September, it was as high or higher during 8 out of the 12 years for which records **are** available. This would indicate that the peak water mark even during later summer months following spring floods was leveled off and reduced by the new dam rather than raised. The records for earlier and later months of the years preceding and following the replacement of the old dam are even more impressive in this respect. This evidence cannot be reconciled with claimant's assertion that damage to her property resulted from the construction of the new dam at McHenry, Illinois.

Claimant has failed to establish her case by a preponderance of the evidence and an award is denied.

Award denied.

**(No.** 3538—Claimant awarded $324.00)

JOHN P. QUIGLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 18, 1947.*

**WALLACE** THOMPSON, for claimant.

GEORGE F. BAHHETT, Attorney General, arid C. ARTHUR NEBEL, Assistant Attorney General for respondent.

MILITARY **AND** NAVAL **CODE OF** THE STATE **OF** ILLINOIS—*whatever right* io *an award exists in favor of a claimant is by virtue of the provisions of the Military and Naval Code of Illinois.* No hard and fast rule exists for determining what amount should be allowed. In certain of these cases this court has seen fit to take as **a** guide, but not as a fixed rule, the provisions of the Illinois Workmen's Compensation Act, in determining what payment would be reasonable for the loss sustained. ***Hall*** vs. *State* **12** C. C. R. **464 (467).**

DAMRON, **J.**

Claimant seeks an award based on Article 16, Section **11,** of the Military and Naval Code of the State of' Illinois. (Chap. 129, Ill. Rev. Stat. 1945.)

The record, as constituted, shows that the claimant John P. Quigley, was a private in the Illinois National Guard July 2, 1937, being a member of Battery "A" Field Artillery and on said date was a member of a gun crew engaged in moving a 155 mm. Howitzer in the armory at Galesburg, Illinois. The record discloses that the Battery was moving equipment under orders, preparator)- to going to field training and while claimant was assisting in moving the field piece, the tread of the rubber-tired wheel caught the buckle of the claimant's boot, pulling his right foot under the tire.

Section 10 of the Code provides that any officer or enlisted man who may be wounded or disabled in any way while on duty and lawfully performing the same, so as to prevent his working at his profession, trade or *other* occupation from which he gains his living, shall be

entitled to be treated by an officer of the medical department detailed by the surgeon general and to draw one-half his active service pay for not to exceed thirty days of such disability, on the certificate of the attending medical officer. If still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers duly convened by order of the commander-in-chief may determine to be right and just, but not to exceed six months unless approved by the State Court of Claims.

Under the provisions of this section, claimant was hospitalized and received medical, treatment. His injured right foot was placed in a cast for 7 weeks, after which he received hydrotherapy treatments at the Illinois Research Hospital. in Chicago ; all medical and hospital expenses incurred in connection with the injury were paid by the respondent.

On July 5, 1937, a Regimental Board of two medical officers and one service officer, there not being three medical officers available at that time, convened and made findings as follows: That the cause of injury to claimant was from a 155 mm. Howitzer wheel rolling upon the outside of the right foot; that the injury was incurred in line of duty; that the proper length of treatment would be indefinite; and that he would be left at home station with arrangements for further treatment by Dr. William H. Maley of Galesburg, Illinois.

On August 9, 1937, the same Regimental Board reconvened and made further findings and recommended that Private Quigley be sent to a hospital for hydrotherapy treatments and that he be paid fifteen days pay at $2.00 per day.

Thereafter, claimant made claim for additional service pay which was denied by the Adjutant General.

The above and foregoing proceedings were authorized under Section 10 of the Military and Naval Code.

On August 26, 1940, claimant filed his claim in this court seeking to recover an award in the sum of $5,000.00 for permanent and partial loss of use of his right foot under Section 11 of Article 16 of the Military and Naval Code.

Evidence in support of the claim was taken February 28, 1947.

Dr. William H. Maley mas called on behalf of claimant and testified that he was a graduate of Rush Medical School, Chicago, Illinois; that he attended the claimant on or about July 2, 1937 at the Armory in Galesburg. The claimant was then taken to St. Mary's Hospital. X-rays were taken of the injured foot and it was placed in a cast. He testified that the junction of the bones of claimant's right foot mas badly crushed although there was no definite fracture, that the injury mas permanent and that in his opinion this claimant had suffered a twenty per cent permanent loss of use of his right foot in consequence of said accident.

Commissioner Jenkins before whom the testimony was taken saw the claimant manipulate his right foot, at said hearing, agrees with the estimate of Dr. Maley that claimant has suffered a twenty per cent permanent loss of use of his right foot. We therefore follow this estimate.

In *Hall* vs. *State*, 12 C. C. R. 464, on page 467, me said, "whatever right to an award exists in favor of claimant is by virtue of the aforesaid provisions of the Military and Naval Code of Illinois. No hard and fast rule exists for determining what amount should be allowed. In certain of these cases this court has seen fit to take as a guide, but not as a fixed rule, the prorisions

of the Illinois Workmen's Compensation Act, in determining what payment would be reasonable for the loss sustained."

Section 8, Paragraph (e) of the Workmen's Compensation Act, as amended, July 1, 1937, provided for the loss of a foot or the permanent and complete loss of its use, 50% of the average weekly wage during 135 weeks.

Again guided by the rule in compensation cases, the claimant's compensation rate, based on the fact that he was the father of two children under 16 years of age dependent upon him for support on the date of the accident, will be $12.00 per week. Claimant therefore would be entitled to an award under the above rule, representing 20% of 135 weeks or 27 weeks at $12.00 amounting to the sum of **$324.00.**

An award is therefore hereby entered in favor of claimant, John P. Quigley, in the sum of three hundred twenty-four ($324.00) dollars.

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(No **3542—Claimants awaided** $1,000.00 )

CHARLES STIH AND THERESA STIH, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 18 1947.*

JAMES E. MALONE, JR., for claimants.

GEORGE F. BARRETT, Attorney General, and C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

DAMAGES—*resulting to pizvate property fiom improvement consisting* of *a public concrete pavement which cut off direct access from property to street, and testamony of witnesses and photographs taken* of *the property will sustain an award of $1,000.00.*

ECKERT, C. J.

The claimants, Charles Stih and Theresa Stili are the owners as joint tenants of the following described real estate:

Lot Three (3) in Block Three (3) in Lapsley's Addition to LaSalle, in the City of LaSalle, County of LaSalle and State of Illinois, excepting coal and mineral rights.

This property lies immediately south of, and fronts to the north, on Fifth Street, and is improved with a dwelling house and a small frame building, formerly used for a retail grocery store. When the buildings were constructed, they were adapted to the then established grades and curb lines of Fifth Street, so that there was free access to the premises from the street.

On September 10, 1940, a highway improvement on Fifth Street, known as State Bond Issue Route 7, Construction Section 34, City of LaSalle, LaSalle County, Illinois, mas begun by the respondent, and mas completed on July 2, 1941. The improvement consisted of a new concrete pavement of variable width which raised the grade of Fifth Street abutting the claimants' property, three to four feet. A retaining wall was also erected, and a pipe fence, so that direct access from claimants property to the street was cut off. Claimants allege that as a result of the construction of this improvement, this propery has been damaged to the extent of $2,000.00.

From the testimony of expert witnesses, from photographs taken of the property both before and after the improvement, it is clear that the raising of the highway level has lessened the value of this property. Commissioner East, who viewed the premises, recommends an award in the sum of $1,000.00. The court is of the opinion that the record amply supports such recommendation.

An award is, therefore, entered in favor of claimants; Charles Stih and Theresa Stih, in the sum of $1,000.00.

(No. 3966—Claimant Awarded $1,476.81.)

LOUIS GLENN SEALOCK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinaon filed* ***September 18, 1947.***

WILL P. WELKER, for claimant.

GEORGE F. BARRETT, Attorney General, and C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION. Award allowed for injury to employee of the Department of Public Works and Buildings, Division of Highways of the State of Illinois during course of employment, 50% permanent and complete loss of the use of left leg.

BERGSTROM, J.

On April 5, 1944, the claimant, Louis Glenn Sealock, employed by respondent as a highway section man in the Department of Public Works and Buildings, Division of Highways, was standing on a road drag being pulled behind *a* truck for the purpose of leveling the shoulders of U. S. Highway No. 40 in Fayette County and the end of the drag struck the culvert head wall, causing the drag to lurch and throw claimant forward to the pavement. One of the drag runners fell on Mr. Sealock's left leg, fracturing it at the ankle.

The driver of the truck called an ambulance, secured the services of Dr. **A.** R. Whitefort, St. Elmo, and called the Effingham office of the Division of Highways, notifying them of the accident. Dr. Whitefort placed Mr. Sealock in the ambulance and took him to the Mark Greer Hospital, Vandalia, Illinois, where Drs. Mark Greer and A. R. Whitefort reduced the fracture and placed the leg in a cast. The same day a representative of the Division of Highways called on Dr. Greer and arranged for claimant's transfer to the care of Dr. **J.** Albert Key, Professor of Clinical Orthopedic Surgery, Washington University,

St. Louis, Missouri. April 7, 1944 Mr. Sealock was transported by ambulance from Mark Greer Hospital to Barnes Hospital, St. Louis, and placed under the care of Dr. Key, where he was hospitalized from April 9 to April 28. After that he paid a number of visits to Dr. Key as the ankle was giving him trouble, and he was again hospitalized at Barnes Hospital from July 17 until July 30, 1945. On July 13, 1946 Dr. Key sent his final report to the Division of Highways, as follows:

"I examined Mr. Glenn Sealock again on July 10, 1946. As nearly as I can determine, his ankle is solidly fused. The fractures are united in good position, and there is no infection in his leg. I do not think that any further treatment is necessary and think that his case might now be settled.

"I have advised that he return to light work and that he increase his activities gradually. I think that a rating of 50 per cent permanent disability in the ankle will be a fair one in this case."

Dr. A. R. Whitefort reported with reference to claimant's disability on December 18, 1946, as follows:

"Left ankle 95%. No side movements. Ant. Post. very slight, possibly ⅛ inch. With ankle stiff we call the limb efficiency as a whole 50% as it throws the skeletal muscles out of line when he walks. He cannot stand on feet too long without pains in left side and back. When he does he cannot rest as pains persist after retiring. It seems to me that a settlement at this time should take into account the fact that time may not correct and might increase the disability. At the present time the man is only 50% efficient in regarding to following a laborer or farmer's occupation. Time may reduce the disability another 25%, but I would not be willing to venture this would be a fact."

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of claimant's employment.

Claimant's earnings during the year immediately preceding his injury were $1,550.00. He has no children under the age of 16 years. His compensation rate is,

therefore, $14.90 per week, and since the injury occurred subsequent to July 1,1943, this must be increased 17½%, making a compensation rate of $17.51 per week.

From the evidence, the Court is of the opinion that claimant has been injured to the extent of 50% permanent and complete loss of the use of his leg, and that he is entitled to an award of $17.51 per week for a period of 95 weeks, or $1,663.45, and in addition thereto, the sum of $28.29 representing money advanced by claimant for travel and medical expenses, making a total of $1,691.74. From the amount of $1,691.74 must be deducted the sum of $214.93, which is the amount respondent overpaid *to* claimant for temporary total disability. Medical expenses were paid by respondent mounting to $1,235.78.

An award is therefore made in favor of claimant, Louis Glenn Sealock, in the sum of $1,476.81, all of which has accrued and is payable forthwith.

Louis A. McLaughlin, court reporter, Vandalia, Illinois, was employed to take and transcribe the evidence in this case and has rendered a bill in the amount of **$36.40.** The Court finds that the amount charged is fair, reasonable and customary, and that said claim be, and is, hereby allowed.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees''.

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(No. 3978—Claimant Awarded $4,500.00.)

LEONE FEELY, MOTHER OF RUTH FEELEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion filed September 18, 1947.***

ROBERT DAVID MACK, for claimant.

GEORGE F. BARRETT, Attorney General, C. ARTHUR NEBEL and WILLIAM L. MORGAN, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION—*compensable accident.* Consultant nurse in the Division of Venereal Disease Control while assigned to **the** Cook County Health Department to instruct nurses in the Venereal Diseases Clinics and being a guest at the LaSalle Hotel with knowledge and approval of her Departmental officials and who died as a result of a fire in the LaSalle Hotel was compensable as an accidental death arising out of and in the course of her employment.

*Miller* vs. *Btate,* **16** C. **C.** R.
*Taylor* vs. *State,* **16** C. C. **R.**

SAME—*partial dependency under Sectaon 7 (c)—proof* of *same.* A mere showing of parentage or lineal relationship raises no presumption of dependency under paragraph (c) of the Act and is a question **of** fact to be established by a preponderance of the evidence. *Bauer & Black* vs. *Ind. Corn.,* **322** Ill. 165. *Peterson* vs. *Ind. Cm.,* **315** Ill. **199. An** award for partial dependency cannot rest on speculation but must be based on facts. *L. M. & O. M. Co.* vs. *Ind. Cowl,.* **335** Ill. **254.**

The test of partial dependency is whether contributions were relied on by claimant for her means of living, judging **by** her position in life, and whether she was to a substantial degree supported by the employee at the time of the latter's death. *Ritzman* vs. *Ind. Com.,* **353** Ill. **34,** Smith Hurd Illinois Annotated Statutes (Perm. Ed.) Ch. **48,** Sec. **144,** par. (c) note 2.

SAME—*same—same—dependency and the extent thereof are questions of fact.* Dependency being shown to exist, the percentage is determined not by the amount **of** the contribution but by the proportion such contribution bears to the cost of living in the dependent's station of life. *Smyth Co.* vs. *Ind. Com..* **306** Ill. **171.** It has been held the act is to receive a practical and liberal construction, *Walchter* vs. *Ind. Coni..* **367** Ill. 256.

BERGSTROM, J.

The claimant, Leone Feely, mother of Ruth O. Feely, deceased, seeks an award under Section (7) (C) of the Workmen's Compensation Act of Illinois.

Claimant's decedent, Ruth O. Feely, succumbed in a fire on June 5, 1946 at the LaSalle Hotel, in Chicago. Miss Feely had been employed by the Department of Public Health for several years prior to June, 1946. As

a coiisultaiit nurse in the Division of Venereal Disease Control, she was assigned to the Cook County Health Department to instruct nurses in the Venereal Diseases Clinics. During the week commencing June **2,** 1946, while so assigned, she was registered as a guest at the LaSalle Hotel, with the knowledge and approval of her Departmental officials.

The Department had immediate notice'of the fact that Miss Feely lost her life in the fire; complaint was filed within six months and hence no jurisdictional questions are presented.

Following the first hearing of this cause a transcript of the evidence was filed on October **30, 1946.** The opinion of. the court filed herein stated that two questions were presented for decision **(1)** Whether claimant was entitled to compensation by reason of her daughter's death in the fire which occurred while she was a guest in the LaSalle Hotel; and **(2)** Whether the mother mas entitled to an award for partial depeiideiicy under the provisions of Section (7) (C) of the Workmen's Compensation Act.

We held that the first of these questions has been resolved in claimant's favor in *Miller* v. *State,* 16 C. C. R. and *Taylor* vs. *State,* 16 C. C. R. In passing on the second question, it was held that the evidence failed to establish the mother's partial dependency, and for that reason an award was denied.

Thereafter, this court sustained claimant's petition for rehearing. or new trial for the reasons set forth in the affidavit filed in support' thereof. The cause was assigned to a commissioner, it being stipulated that any part of the transcript of the evidence taken at the former hearing, together with the exhibits then introduced, might be considered for all purposes as though such evi-

dence had been taken and introduced upon the re-hearing.

Claimant, Leone Feely, testified in her own behalf in considerable detail concerning the facts bearing upon the question of dependency, and a transcript of this evidence was filed on July 25, 1947.

The earlier holding of this court in *Miller* v. *State* and *Taylor* vs. *State, supra,* sustains the previous conclusion of this court in this cause that the death of claimant, decedent in the fire at the LaSalle Hotel on June 5, 1946 under the circumstances disclosed by this record was compensable as an accidental death arising out of and in the course of her employment.

With respect to the only other issue raised by the proof, as to whether claimant has established by a preponderance of the evidence her partial dependency under Sction 7 (C), the additional evidence presented by her on the re-hearing is sufficient to resolve that question affirmatively in her behalf.

The material evidence in regard to this phase of the case may be summarized as follows:

The deceased, Ruth O. Feely, was 37 years of age on June 5, 1946. She had never married. During the year preceding her death her earnings from the State were $2,928.85. In addition she was reimbursed by respondent for her travelling and maintenance expenses amounting to about $115.00 to $150.00 per month. She had no other source of income.

Her mother, Leone Feely, was 59 years of age. Ruth O. Feely was her only child. Claimant was divorced in 1916 and for more than thirty years the father never contributed to the support of the child. Claimant is employed by the Department of Revenue and during the year preceding her daughter's death earned $143.75 a

month which, after tax and other deductions left her $120.16 net per month. She had no other source of income.

Except for a short interval of a few months immediately following the divorce, the daughter and mother lived together.

In 1932, shortly after Ruth completed her nurses training, and obtained employment, a home was established and her mother discontinued working. She was not again employed until June, 1942, at which time she secured employment with the Department of Labor. During these years of unemployment, as well as during a later interval of non-employment from September 1, 1943 until April, 1944, Ruth was her mother's sole means of support.

The mother and daughter resided in Springfield, Illinois. They occupied a rented six room unfurnished home. The household furnishings belonged to the daughter, having been purchased by her.

Ruth Feely and her mother always deposited their respective pay checks in a local bank account in their joint names. Ruth paid all major bills by check drawn on this account.

The daughter's duties in the field as consultant nurse for the Department of Health required her to leave Springfield every Sunday evening or early Monday morning. She seldom returned until Friday evening. Each week when she departed she would withdraw her weekly travelling expense and also draw a check to cash for $25.00 which she turned over to her mother for the latter's daily routine personal expenses such as meals, transportation, medicine, and occasional amusements. The daughter frequently purchased apparel for her mother.

During the year or two preceding Ruth's death, claimant was in, ill health suffering from neuritis and arthritis which necessitated the services of a physician, therapeutic treatments and special medication.

The mother testified that her personal expenses ran between $225.00 to $250.00 a month. On the first hearing she testified that Ruth contributed about $150.00 per month to her personal support. On the present hearing before the Commissioner she testified in considerable detail as to her living expenses. The following tabulation elicited from her testimony, itemized her personal monthly expenses as follows:

| | | | |
|---|---|---|---|
| Rent | $55.00 | | |
| Coal | 10.50 | | |
| Garage | 3.00 | | |
| Meals | 55.00 | | |
| Clothing | 20.00 | to | $25.00 |
| Physicians—Medicines | 10.00 | to | 15.00 |
| Laundry—Dry Cleaning | 10.00 | to | 12.00 |
| Carfare | 4.00 | | |
| Reading material, papers, magazines.. | 5.00 | | |
| Maintenance Man | 4.40 | | |
| Telephone | 3.75 | | |
| Gas—Light | 3.00 | to | 3.50 |
| Water bill | .65 | to | .SO |
| Insurance premiums—life, accident, hospital. . | 4.50 | | |
| Entertainment | 5.00 | | |
| Church and charity.. | 2.75 | | |
| Beauty Parlor—hairdresser, manicure, cosmetics | 15.00 | | |
| Cigarettes | 5.00 | | |
| Total | $217.55 | to | $230.40 |

At the time of Ruth's death there was less than $300.00 in their joint bank account, and other than a small amount of war bonds neither had accumulated any savings.

It is obvious from claimant's testimony that her net earnings of $120.16 (after deductions) were inadequate to defray her personal living expenses as hereinabove

enumerated, and that she was to a substantial degree dependent upon and supported by her daughter at the time of her death. This evidence of claimant was not controverted. It amply sustains the conclusion that she relied upon her daughter for reasonable necessities consistent with her position in life.

It is equally manifest that the amount expended for the various items as testified to by claimant was reasonable and conservatively compatible with prevailing living costs for one in her position in life. The statement from the opinion in *Air Castle* v. *Industrial Commission,* **394** Ill. **62** to the effect that "we take judicial notice of the fact that living expenses increased greatly" is germane at this point.

The Attorney General moved to strike claimant's testimony with respect to the beauty parlor treatments. entertainment, church and charitable donations. While we would hesitate to say that expenditures in such amounts for such purposes, by a person employed as claimant is, in a public office requiring her to present a neat and wellgroomed appearance, are not reasonably necessary, it will serve no useful purpose to extend this discussion or resolve that evidentiary problem in view of the conclusion reached.

The basic legal principles applicable to this aspect of the record have been firmly established.

A mere showing of parentage or lineal relationship raises no presumption of dependency under paragraph (c) of the Act and is a question of fact to be established by a preponderance of the evidence. *Bauer & Black* v. *Ind. Com.,* **322** Ill. 165; *Peterson* v. *Ind. Corn.,* 315 Ill. 199 An award for partial dependency cannot rest on speculation, but must be based on facts. *L. M. & O. M.* Co. v. *Ind. Corn.,* **335** Ill. **254.**

The test of partial dependency is whether contribn-. tions were relied on by claimant for her means of living, judging by her position in life, and whether she was to a substantial degree supported by the employee at the time of the latter's death. *Ritzman* v. *Ind. Corn.,* 353 Ill. **34,** and other cases cited, Smith Hurd Illinois Annotated Statutes (Perm. Ed.) Ch. 48, Sec. 144, par. (c) note 2.

On the other hand partial dependency may exist even though the evidence shows that claimant could have subsisted without the contributions of the deceased employee. *Ritzman* v. *Ind.* **Corn.,** *supra,* and Smith Hurd Ill. Anno. Statutes (Perm. Ed.) Chapter 48, Sec. **744,** par. (c), supra.

Dependency and the extent thereof are questions of fact. Dependency being shown to exist, the percentage is determined not by the amount of the contribution but by the proportion such contribution bears to the cost of living in the dependent's station in life. *Smyth* Co. v. *Ind. Conz.,* 306 Ill. 171.

It has often been held that on questions of dependency the Act should receive a practical and liberal construction, *Walchter* v. *Ind. Corn.,* 367 Ill. 256, *Air Castle* v. *Ind. Corn.,* 394 Ill. 62.

The preponderance of the undisputed testimony in this record as it now stands at the conclusion of the rehearing establishes that claimant is entitled to an award for partial dependency under Section 7 (C).

In determining the degree of such dependency it suffices to say that if the items objected to by the respondent are excluded, claimant has nevertheless shown that not less than $200.00 was required to provide the shelter, food, clothing, medical attention, carfare and other incidentals as itemized by her testimony. Her net or "take home pay" was $120.16. This left a deficit

of $80.00 per month to prgvicle these reasonable necessaries, which deficit was met from her daughter's earnings. $80.00 represents 40% of her total support needs of $200.00 and claimant is entitled to an award to that extent.

Claimant consequently should be awarded **$3,750.00** under Section 7 (C) of the Act, to be increased **20%** under Section 7(1), making a total award of **$4,500.00,** Claimant's intestate weekly earnings were **$56.32,** and therefore, her compensation rate is $18.00 per week, being the maximum of **$15.00** increased **20%** in accordance with Par. 1 of that Section.

An award is therefore made in favor of claimant, Leone Feely, in the amount of **$4,500.00,** to be paid to her as follows:

**$1,206.00, accrued, is payable forthwith;**
**$3,294.00, is payable in weekly installments of $18.00, beginning September 26, 1947 for a period of 183 weeks.**

Future payments being subject to the terms of the Workmen's Compensation Act, including respondent's right of subrogation under Section 29 of the Act, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

In view of the above award, the award of **$150.00** to be paid to claimant and the award of $400.00 to be paid to the State Treasurer under Par. E, Section 7 of the Compensation Act, allowed in the original opinion filed herein, is hereby nullified and set aside.

Eileen Jones, reporter, First National Bank Building, Springfield, Illinois, was employed to take and transcribe the evidence at the original hearing of this case, and has rendered a bill in the amount of **$45.50.** The Court found, in the original opinion filed, that the amount

charged was fair, reasonable and customary, and said claim be allowed, which finding is hereby confirmed.

A. M. Rothbart Court Reporting Service, 1308—120 South LaSalle Street, Chicago, Illinois, was employed to take and transcribe the evidence in this case at the rehearing thereof, and has renderd a bill in the amount of $57.05. The Court finds that the amount charged is fair, reasonable and customary, and said claim is allowed.

This award is subject to the approval of the Governor as provided in Section 3 of "an Act concerning the payment of compensation awards to State employees''.

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(No. 4000—Claimant awarded $208.55.)

WILLIAM EGGERT, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 18, 1947.*

PHILIP J. SCHLAGENHAUF, for claimant.

GEORGE F. BARRETT, Attorney General, and

ARTHUR NEBEL, Assistant Attorney General, for Respondent.

**WORKMEN'S COMPENSATION ACT. Employee of the Department of Public Works and Buildings, Division of Highways, entitled to temporary total disability and permanent partial loss of his right third finger, upon compliance with the terms of act.**

ECKERT, C. J.

On June 11, 1946, the claimant, William Eggert, employed by the respondent as a laborer in the Department of Public Works and Buildings, Division of Highways, while engaged in loading drums of bituminous material onto a truck near Goodfield, Woodford County, Illinois, caught his right third finger between a falling drum and a drum lying on the ground. Immediately after the accident, he was taken to the Eureka Hospital,

Eureka, Illinois, where it was found necessary to amputate the distal phalanx of this finger.

'At the time of the accident, the employer and the employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The earnings of the claimant at the time of the injury were 75c per hour for an eight hour day, and employees of the respondent eiigaged in similar capacity worked less than 200 days per year. Claimant's compensation rate is, therefore, $11.54. The injury having occurred after July 1, 1945, this must be increased 20%, making a compensation rate of $13.85 per week.

The report of the Division of Highways shows that claimant was wholly incapacitated from June 12, 1946, to September 4, 1946, a period of twelve weeks. Claimant was paid compensation for that period in the amount of $130.78. He was entitled, however, to compensation for temporary total disability in the amount of $166.20, so that there is due claimant a balance of $35.42 on account of temporary total disability.

Claimant is also entitled to an award for the loss of the distal phalanx of his right third finger, or an award of $13.85 for a period of 12½ weeks, being in the aggregate $173.13.

An award is, therefore, entered in favor of the claimant in the amount of $208.55, all of which has accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4007—Claimant awarded $4,501.73 plus life pension.)

CLARENCE R. HIERONYMUS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinaon filed September 18, 1947.*

ROBERT H. ALLISON, for claimant;

GEORGE F. BARRETT, Attorney General;

C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*totally and permanently disabled.* Where an employee of the Department of Public Works and Buildings, Division of Highways, as a laborer, receives an injury resulting in totally and permanently disabling said employee, an award is justified upon compliance with the Act.

ECKERT, C. J.

On August 21, 1946, the claimant, Clarence R. Hieronymus, employed by the respondent in the Department of Public Works and Buildings, Division of Highways, as a laborer, while completing the greasing of a mud-jack, stumbled on the tongue of a service trailer, and fell backwards, striking his head and back on rough ground. Although the injury was painful, he returned to his work until evening when, at the suggestion of his foreman, he consulted Dr. Hubert Lang, of, Armington, Illinois.

Dr. Lang reported, after his examination, that claimant had suffered a severe contusion and sprain of the thoracic-lumbar region of his back. The doctor prescribed bed rest, heat and 'taping. X-rays were negative for a recent fracture.

On November 12, 1946, the claimant was taken to

ago when he fell from a truck causing an injury of his cervical spine. He had, even at that time, a very severe hypertrophic spondylitis of the whole spinal column causing a great deal of limitation of motion. This is so severe that I doubt if he should be doing very active physical work, if that was his only disability. He, however, began to show some epileptiform seizures following his original injury while he was still in the hospital. He returned to work for the Department, but I believe still has these peculiar epileptic attacks.

"I believe that we must regard these epileptic attacks as being in some way related to his injury a number of years ago. Certainly it is not safe for him to try to carry on any remunerated activity, as these attacks come quite commonly and would make his work quite dangerous. His hypertrophic changes in his spine are also rather severe and would almost prevent his doing any active work even though he did not have the attacks. I believe we have to regard his condition as a permanent complete disability so far as active work is concerned."

On December 9, 1946, Dr. Cooper submitted the following supplementary report :

"I wish to supplement my recent report on Mr. Clarence Hieronymus as I did not in my recent statement make any statement with regard to his accident of August 21, 1946. He apparently had a rather hard fall at that time landing on his head and immediately began to have more and more trouble with his back pain. Although he has had a generalized hypertrophic arthritis of the spine, he has been able to work with it. The aggravation of this condition, by his fall in August, has made him almost completely disabled.

"Since this man's injury some years ago he has been having some mild epileptiform attacks. It is probable that he had an attack at the time of this fall in August, although this is not a provable point. Considering the hypertrophic spondylitis, which he has, and peculiar epileptiform seizures which have been getting gradually worse, I believe that this man is disabled completely so far as remunerative employment is concerned."

Dr. Lang also submitted a further report in December, 1946, in which he stated that claimant had a severe arthritis of the spine, and healed fractures of the spine from an older injury. Dr. Lang stated, however, that, since the accident of August 21, 1946, claimant's back pains had been more severe, and the epileptic spells, which began after an injury in 1943, had been aggravated.

From these reports, and the testimony taken before

Commissioner Jenkins, it appears that claimant is a man sixty-seven years of age, married, but with no children under sixteen years of age dependent upon him for support. He was first employed by the respondent in 1941, and received a service connected injury, resulting in a broken vertebra, during the year **1943.** Following his recovery from that injury, he was re-employed by the respondent. Since the injury of August 21, 1946, claimant has been wholly incapacitated.

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. The accident arose out of and in the course of claimant's employment. No claim is made for temporary total disability, nor for medical expenses, which were paid by the respondent. Claim, however, is made for total permanent disability.

Claimant's earnings during the year immediately preceding his injury were $1,584.00. His compensation rate is, therefore, the maximum of $15.00; since the injury occurred subsequent to July **1, 1945,** this must be increased 20%, making a compensation rate of $18.00 per week.

The Court finds that claimant is totally and permanently disabled, and that he is entitled to an award of $18.00 per week for a period of 266 weeks, and one week at $12.00 per week, or a total award of $4,800.00, and thereafter a pension for life. From this award of $4,800.00 must be deducted the sum of $298.27 which was paid by the respondent for temporary total disability.

An award is, therefore, entered in favor of the claimant, Clarence R. Hieronymus, in the amount of $4,501.73, payable as follows:

**$ 709.73,** which has accrued as of September **18, 1947,** is payable forthwith.

**$3,792.00,** payable in weekly installments of **$18.00,** beginning September 18, **1947,** with **a** final 'payment of **$12.00;** and thereafter **a** pension for life in the sum of **$384.00** annually, payable in monthly installments of **$32.00.**

Future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees.''

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(No. 4011—Claim denied.)

**VERNON OIL COMPANY, AN ILLINOIS CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.**

*Opinion filed September 18, 1947.*

CARL E. STILWELL, for Claimant;

GEORGE F. BARRETT, Attorney General;

C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

**MOTOR FUEL TAX**— *overpayment of tax — claim filed more than 2 years after the cause of action accrued.* Pursuant to Chapter **37,** Section **439.22,** Illinois Revised Statutes **1945,** and referred to as Section **22** of the Court of Claims Act in effect on July **1, 1945** operates as a limitation on the jurisdiction **of** this court; reference is made to ***Illinois Oil Company*** **vs.** *State,* No. **3976** Opinion which was filed at this term of Court.

BERGSTROM, **J.**

Claimant, Vernon Oil Company, an Illinois corporation, filed its complaint on March **3, 1947** to recover the sum .of **$7,396.15,** which sum it alleges was overpaid to the State for motor fuel tax owed to the State for the

period from January 1, 1938 through July 1944. The complaint further alleges that in the latter part of the year 1944 the State audited the books of claimant for the purpose of checking the motor fuel tax owed to the State for the period from January 1, 1938 through July 1944, and that said audit showed claimant had overpaid the motor fuel tax by the said sum of $7,396.15.

The respondent filed a motion to dismiss the complaint for the reason that the claim is barred by the statute of limitations contained in Chapter 37, Section 439.22, Illinois Revised Statutes 1945. This section is commonly referred to as Section 22 of the Court of Claims Act, which went into effect on July 1, 1945, and reads:

"Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the clerk of the court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons, and persons 'under other disability at the time the claim accrues two years from the time the disability ceases."

The complaint, on its face, shows that the cause of action arose over two years prior to March 3, 1947, the date complaint was filed. In the case of Illinois Oil Company v. State, No. 3976, opinion in which mas filed at this term of Court, we discussed this question at length. We held in this case that said Section 22 operates as a limitation on the jurisdiction of this Court, and that claim must be filed within two years from the time the cause of action accrued.

The motion of respondent is granted, and the case is hereby dismissed.

(No. 4012 Claimant awarded $4,800.00.)

DOROTHY FOGLEMAN, WIDOW OF GLEN FOGLEMAN, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 18, 1947.*

CLAIMANT, *pro* se.

GEORGE F. BARRETT, Attorney General;

C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*claim by widow under Section 7 of said act.* Where employee of the Department of Conservation while returning to work in an automobile and his front tire blew out causing his death and his widow complying with all provisions of said act is entitled to an award under Sec. 7 (a).

ECKERT, C. J.

Claimant, Dorothy Fogleman, is the widow of Glen Fogleman, deceased, who was formerly employed by the respondent as Supervisor of Pedatory Control in the Department of Conservation. On February 5, 1947 claimant mas engaged in the bombing of a crow rookery near Oblong, Illinois. In the company of other employees of the department, he hung dynamite shot bombs in a hedgerow and drove to Oblong for lunch. While returning to the rookery to explode the bombs, a front tire of his automobile blew out, and the car crashed over a twenty foot embankment, resulting in his death from a fracture of the neck. Claimant, as widow of the deceased employee, seeks an award for the death of her husband under the provisions of the Workmen's Compensation Act.

At the time of the accident, which resulted in the death of Glen Fogleman, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the

time provided by the act. The accident arose out of and in the course of decedent's employment.

Decedent had been employed by the respondent continuously for more than one year prior to his death at a salary of $2,556.00 per year decedent's average weekly wage was $49.15 so that his compensation rate is the maximum of $15.00 per week. The death having occurred subsequent to July 1, 1945, this must be increased 20%, making a compensation rate of $18.00 per week. The decedent had no children under sixteen years of age dependent upon him for support at the time of his death.

Claimant is, therefore, entitled to an award under Section 7 (a) of the Workmen's Compensation Act in the amount of $4,000.00, which must be increased 20% under Section 7 (1), making a total award of $4,800.00.

An award is, therefore, made in favor of the claimant, Dorothy Fogleman, in the amount of $4,800.00 to be paid to her as follows:

**$ 576.00, accrued is payable forthwith;**
**$4,224.00,** is **payable in weekly installments of $18.00 per week, beginning September 18, 1947,** for **a period** of **234 weeks, with an additional final payment** of **$12.00.**

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An act concerning the payment of compensation awards to State employees."

(No. 4013—Claimant awarded $1,388.79.)

FORD B. LINDEBERG, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed September 18, 1947.*

ROY A. PTACIN, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when award may be under for total temporary disability and permanent partial loss of use of left* ley *and little finger of the left hand.* Where it is undisputed that employee, sustaining accidental injuries, resulting in permanent partial loss of use of leg, was at the time thereof in accordance with the provisions thereof and where employee fully complied with requirements of said Act and made proper proof of claim for compensation, an award is justified.

DAMRON, J.

This complaint was filed March 7, 1947 aiid the evidence heard on June 3, 1947. The record consists of the complaint, transcript of the testimony, departmental report, and stipulation of the parties waiving statement, brief, aiid argument. No jurisdictional question is raised.

The claimant, Ford B. Lindeberg, 46 pear's of age, on September 21, 1946, was employed by respondent in the Department of Public Welfare as an attendant at the Chicago State Hospital. On that day while on duty in Cottage Ward 10-11, about 6:45 a.m., he was assaulted by a patient and thrown to the floor injuring his left knee and left hand.

Claimant was immediately examined by the night physician and carried on a stretcher to the employee's infirmary, where he was confined to bed and given first aid. The same morning following further examination and X-rays which disclosed a comminuted fracture of the patella, he was transferred to the Illinois Research Hospital. Additional X-rays were taken and the fracture of the left knee was reduced by a bone operation and

the fragments held in apposition by a mire suture.

Claimant was hospitalized at Illinois Research Hospital until October 16 and then returned to the Chicago State Hospital' for further treatment. He was in the hospital until October 29, 1946. He returned to work on December **1, 1946.**

Prior to the accident, claimant's general condition, including his left knee and hand, was very good but since then, he has no strength or stability in his leg after normal use and after a few hours work, he experiences pain and is compelled to bandage the leg.

Dr. Albert C. Fields, called on behalf of the claimant, testified that the movement of the knee on palpation was restricted to about three-quarters of normal; with instability of the knee joint and an abnormal increase in lateral movement. The fourth finger of the left hand is held in a flexed deformity with a limitation of extension of about 45 degrees enlargement of the mid-phalangeal joint and an inability of about 10 to 15 degrees in bringing the tip of the finger to the palm of the hand. In his opinion, the condition is described as permanent.

This testimony was further corroborated by X-rays revealing the comminuted fracture of the left patella and the fracture of the fourth finger of the left hand. The fractured knee fragments were not in complete apposition and bony union is not established between the fragments.

Dr. Louis Olsman, surgeon and personnel physician at the' Chicago State Hospital, was called as a witness by respondent. He testified in the same respect as to the fractures and in answer to a question by the Assistant Attorney General stated that he (claimant) has obtained as much healing as he will with that fracture. He further testified that a union of the fractured knee was not

obtained and that an X-ray as recent as March 6, 1947, showed three definite fragments separated by about a quarter of an inch with a metal wire encircling the patella. He also found about a 45 degree limitation of extension in the little finger of the left hand.

Commissioner Blumenthal who heard the testimony in this case reports there is a reddened well-healed, crescent-shaped scar about 5½ inches long over the left knee cap and the lack of apposition of the fractured fragments was obvious from observation of the X-ray as was the deformity of claimant's little finger on his left hand.

Claimant's annual average wage was $1,440.00 with a weekly wage of $27.69. His weekly compensation rate would be $13.85 increased by **20%** or a total rate of $16.62.

The evidence in this case on behalf of claimant as corroborated by respondent's witness clearly indicates that claimant has sustained a forty per cent permanent and partial loss of use of his left leg for which he is entitled to $1,263.12 at the rate of $16.62 for 76 weeks.

As shown by the record, claimant also suffered a fifty per cent permanent and partial loss of use of the little finger of the left hand for which he is entitled to $166.20 at the rate of $16.62 for 10 weeks.

While at the Illiiiois Research Hospital claimant personally paid $16.25 for medicines and X-rays as shown by the itemized receipted bills for such charges for which he is entitled to an award reimbursing him for these expenditures.

Claimant returned to work on December 1, 1946 and was entitled to receive $166.20 for 10 weeks temporary total disability. He was paid $115.00 for September, $104.80 for October, and $86.25 for November, or a total

of $306.05 of which $83.07 was earned during September. The balance of $222.98 represents a payment of $56.78 in excess of the $166.20 compensation to which he was entitled and this sum of $56.78 must be deducted from the award.

An award is therefore hereby entered in favor of claimant in tlie sum of One Thousand Three Hundred Eighty-Eight Dollars ($1,388.79) Seventy-Nine Cents ($1,445.57 less $56.78) of which $698.04 has accrued as of September 20, 1947 aiid the balance of $690.75 is payable at the rate of $16.62 per week commencing September 27, 1947.

A. M. Rothbart, Court Reporting Service, 120 South LaSalle Street, Chicago, Illinois, was employed to take and transcribe the evidence in this case and has rendered a bill in the amount of $47.20. The Court finds that the amount charged is fair, reasonable and customary and said claim is allowed.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees".

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**(No. 4014—Claim denied.)**

WILLIAM B. MYERS, JR., Claimant. *vs.* **STATE OF ILLINOIS**, Respondent.

*Opnion pled September 18. 1947.*

CHIEF JUSTICE ECKERT, dissenting.

MAURICE DEWITT, for Claimant.

GEORGE F. BARRETT, Attorney General.

C ARTHUR NEBEL, Assistant Attorney General, for Respondent.

ber of the Illinois Reserve Militia when on duty is rendering the highest degree of service to the State which it is possible for a citizen to render. He is performing a duty which a citizen may be called upon to perform by his government in time of national emergency with or without his consent; it is not a contract of employment, measured by the accepted concept of such a contract with respect to private employment. He is governed by the terms of the military code and his relationship is essentially different from the relationship of master and servant as considered by existing law and custom.

DAMAGES—*damages to private property owned by members of the militia.* A member of the Illinois Reserve Militia cannot recover damages to his private property without express statutory authority nor without presenting a legal basis for the same.

BERGSTROM, J.

Claimant filed his complaint on March 12, 1947 for damages to his airplane resulting from an accident which occurred on September 27, 1946 while participating in a test mobilization of the Air Corps of the Illinois Reserve Militia.

The record consists of the Complaint, Departmental Report, Claimant's Waiver of Brief, and Respondent's Waiver of Brief.

The claimant, William Myers, Jr., testified that he served in the United States Air Forces during the last war for almost three years; that he was connected with the Air Transport Command as Chief Flight Check Engineer and, as a part of his duties, had to relieve the co-pilot and pilot in test flights and act as co-pilot engineer on runs of lighter aircraft in the United States. It was also part of his duties to bring planes from the hangar to the flight line and taxi planes while on the ground. He had flown about 3,000 hours and had been on air fields in thirty foreign countries and on practically every airport in the United States of any size, and had completed twenty-four circuits on the Hump which is considered the most hazardous route in the world, without any accident.

The evidence further shows that claimant was a rated pilot and was commissioned as a Captain in the Air Wing of the Illinois Reserve Militia on June 16, 1946, and that pursuant to orders he reported for training maneuvers of the Air Wing of the Illinois Reserve Militia at the Chicago Municipal Airport. There were about fifty aircraft engaged in the maneuvers and he, like most of the officers in the Air Wing, owned his own plane. On September 27, 1946 while engaged in said maneuvers arid while acting under orders, claimant's. airplane collided with a jeep and was severely damaged. When the accident happened claimant had the left wing position in a V formation. He was flying a B.T. 13 and had very limited ground vision while taxiing, and he testified that in taxiing or flying in formation each of the planes of the wing V are to watch the flight leader and maintain their positions, and it is his duty to keep his eyes ahead for any obstructions, such as other airplanes. It is also the duty of the control tower to warn the pilot of any obstructions. Section 1.130 of Standard Airport Traffic Control Procedures, which was introduced into evidence, states "The importance of issuing definite concise instructions to pilots of taxiing aircraft cannot be overemphasized. The visibility problem in an airplane is most acute when taxiing. Very few aircraft afford anp forward vision for several yards directly in front of the airplane and the pilot must depend to a large degree upon the control tower to issue necessary instructions which will assist him in determining the proper taxi route and mill prevent collision with other aircraft or objects".

On this particular flight the pilots were under orders to ignore the control tower and to depend on the landing signal officer for their signals. At the time the accident happened the landing signal officer gave the

"all clear" signal and was waiving the flight on. The evidence also shows that the signal officer was the one who left the jeep at the end of the runway. Claimant's testimony is substantiated by another officer in the same flight. From the evidence, the Court is of the opinion that the accident was caused by the negligence of the signal officer, and claimant would be entitled to an award if there was some legal basis on which to give it. In the case of *Butterworth* v. *State,* **14** C. C. R. 188, this court denied the claim where the claimant owned his airplane which was severely damaged while acting under orders investigating flood conditions, when the plane in taking off smashed into a ditch, as there was no legal basis on which to make an award.

We have held in numerous cases that an employee's property, damaged by the negligence of 'another employee, was not compensable; that the' State does not insure the property of an employee used by such employee in his employment; and that the State is not liable for damages caused by the negligence of its employees. These cases were all decided, however, before the new Court of Claims Act went into effect in July **1945,** which, under paragraph C, Section 8 of the said Act, gave the Court jurisdiction of cases against the State of actions sounding in tort, and which specifically provides that the defense that the State is not liable for the negligence of its officers, agents and employees in the course of their employment, shall not be applicable. As this section reads, the words officers, agents and employees are written in this order and are immediately followed by the words "in the course of their employment". We construe the words officersand agents as used here, with the word employees, to make it all inclusive so as to cover any person serving the State under the heading, of em-

ployment, as the word employment affecting a relationship of master and servant is ordinarily construed. As the Statutes must be strictly construed, the words officers and agents as here used would mean the same as employees. In view of the above provisions there would be no difficulty in deciding the case before us if claimant, while on active duty with the militia, could be classified as employed by the State.

In denying such a claim, *Butterworth* v. *State, supra,* in our dictum, referred to claimant's status, in substance, as an employee of the State, but this point was not at issue or controlling in this case. In the case before us it is a material fact, and we must necessarily decide whether a member of the militia while on active duty, is or is not an employee of the State. A member of the militia is rendering the highest degree of service to the State which it is possible for a citizen to render. He is protecting and defending the sovereign power of the State. He is performing a duty which a citizen may be called upon to perform by his government in time of national emergency with or without his consent. Life itself may be the price he must pay for enjoying his high privilege of citizenship. It is not a contract of employment, measured by the accepted concept of such a contract with respect to private employment. *Hays* v. *Illinois Transportation* Co., *363* Ill. 398. The minute he is sworn in he is subject to the orders of his superiors. His individual freedom of action is strictly limited and restricted. He is governed by the terms of the military code, and penalties for infractions of the regulations therein prescribed may result in punishment by the military and may even extend to imprisonment, and in time of war, death. His rate of pay, subsistence, clothing, medical service, disability compensation and like matters,

are all provided for by specific statutory authority. It is essentially different from the relationship of "master and servant" as this relationship is considered by existing law and custom.

Under Par. C of Sec. 8 of the new Court of Claims Act, this court could, in a proper case, award damages to property where the accident was caused by the negligence of an employee of the State. However, for the reasons above stated, we must conclude that a member of the militia cannot be considered an employee of the State, and an award cannot be allowed under said Par. C of Sec. 8. Neither are we advised of any authority under the Military and Naval Code for payment of damages to private property owned by members of the militia, nor has counsel for claimant presented any legal basis for payment of this claim. In the absence of express statutory authority to pay claims of this nature they must be denied, even though claimant has suffered damage resulting from circumstances beyond his control and regardless of the equities of the case.

For the reasons stated, the claim is hereby denied.

ECKERT, C. J. (Dissenting).

## DISSENTING OPINION OF JUDGE ECKERT

Under Section 8 of "An Act to create the Court of Claims, to prescribe its powers and duties, and to repeal an Act herein named", which became effective July 17, 1945, this Court was given jurisdiction to hear and determine:

"All claims against the State for damages in cases sounding in tort, in respect of which claims the claimants, would be entitled to redress against the State of Illinois, at law or in chancery, if the State were suable, and all claims sounding in tort against The Board of Trustees of the University of Illinois; provided, that an award for damages in a case sounding in tort shall not exceed the sum of $2,500.00 to or for the benefit of any claimant. The defense that the

State or The Board of Trustees of the University of Illinois is not liable for the negligence of its officers, agents, and employees in the course **of** their 'employment shall not be applicable to the hearing and determination of such claims."

To construe the obviously broad language of this section so as to exclude members of the Illinois Reserve Militia, while on active duty, appears contrary to the expressed legislative intent. There is nothing in the act from which we can rightfully infer that the General Assembly intended the words "officers, agents and employees" to be limited to a "master and servant" relationship.

A member of the Illinois Reserve Militia, while on active duty, "rendering the highest degree of service to the State which it is possible for a citizen to render", is certainly as much an "officer, agent and employee" of the State as is a member of the Illinois State Police or any other person serving the State in any other type of service. It is true that distinctions can be drawn between various types of employment within the State, but service in the Illinois Reserve Militia is nevertheless an employment of the highest type, and as integral a part of State government as can be found.

I am of the opinion that Section 8 (C) of the present Illinois Court of Claims Act was intended to include members of the Illinois Reserve Militia, while on active duty. and that therefore an award should be made in this case.

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**(No.** 4015—Claimant awarded $811.53.)

CLAUDIA LAYMAN, Claimant, *us.* **STATE OF ILLINOIS,** Respondent.

***Opinion filed September 18, 1947.***

ROY A. PTACIN, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*nature and extent of injury—temporary total compensation.* Where an employee, as an attendant at the Chicago State Hospital, received an injury to her left hand by being struck on said hand with the heel of a shoe by a patient she was attempting to subdue, resulting in a **30%** permanent loss of use of her left hand, an award **for** compensation therefor may be made, in accordance with the provisions of the Act, upon compliance **by** the employee with the requirements thereof.

DAMRON, **J.**

On January 25, 1947, the claimant, Claudia Layman, employed at the Chicago State Hospital as an attendant, received an injury to her left hand by being struck on said hand with the heel of a shoe by a patient she was attempting to subdue.

The injury was immediately reported to her superior in said institution and claimant, was immediately sent to the employee's hospital. X-rays were made of the left hand which divulged a fracture of the proximal end of the 5th metacarpal. Her left hand was immobilized with splints. She returned to **work** on the 11th day of March 1947 and during the time of her recuperation period, was paid her full salary. The record' discloses that during the year next preceding the injury, claimant was on leave of absence twice and the amount earned by her during that year aggregated $1,189.00.

It is stipulated, however, in the record, that employees in the same line of employment who worked a full year, received $1,740.00. It is further stated that all first aid, medical and hospital services were providecl claimant by respondent.

There being no jurisdictional question raised on the part of the respondent, the only issue to be decidecl by this court is the nature and extent of the injuries received by claimant on January 25, 1947, and an adjudication between the amount of money paid to her for unproductive work and the amount she would be entitled to receive as

temporary total compensation during the time she was recovering from said injuries.

Claimant testified that as a result of using her left hand since the injury, it becomes sore and stiff; that the 4th and 5th fingers are stiff along the outer edge to the wrist bone. She further testified that she'was unable to do all her usual tasks about her home due to this stiffness of tlie hand and that she cannot lift anything, cannot sweep by using a broom, and could not wring clothes as she had been able to do prior to the accident.

Dr. Albert C. Fields was called as a witness on behalf of claimant and testified that he had examined the injured hand which disclosed some deformity at the 5th metacarpal carpal articulation. The 5th finger, he testified, is held in a somewhat flexed deformity, limitation of extension about 35 degrees. He said there was practically no flexion in the mid-phalangeal joint. In motion, she lacked about an inch of bringing the tip of the finger to the palm of the hand. There is also some restriction of movement in the phalangeal joint of the other fingers. He testified he took X-rays of thg injured hand which were introduced in evidence and stated that they disclosed evidence of a bony injury, and an impacted comminuted fracture at tlie, proximal end of the 5th metacarpal; that there was considerable deformity present **at** the site of the fracture.

Dr. Louis Olsman was called on behalf of the respondent; he testified that X-rays taken by him revealed a fracture at the proximal head of the left 5th metacarpal with some deformity and separation of the proximal fragment. He testified that repeated X-rays taken at intervals after the injury showed healing to be progressive. The claimant, he said, was given physiotherapy in the course of her convalescence. He testified

that at present, the patient has evidence of tenderness at the base of the left 5th finger at the 5th metacarpal carpal articulation; that there was a modified degree of contracture of the left 5th finger with limitation of complete flexion to within a half inch of the palm. That there was to a lesser degree, a limitation of flexion of the left 4th finger to within a quarter of an inch of the palm. Dr. Olsman in response to a question testified that there was about 30 degrees of full extension of the 5th finger of the injured hand.

The record discloses that at the time of the injury, claimant was 44 years of age, was married and had no children under 16 years of age dependent upon her for support. The report of the Department of Public Welfare filed herein, discloses that claimant was paid her full salary at the rate of $145 a month for January, February, and March 1947.

Upon full consideration of this record, we make the following findings: that the average weekly wage of claimant is **$33.45** based on the annual earnings of employees in like employment and that her weekly compensation rate at the time of injury was $18.00. We find from the medical testimony that claimant has sustained a 30% permanent loss of use of her left hand and that she is entitled to an award of 51 weeks at $18.00 or the sum of $918.00.

The record discloses that she was incapacitated for work from January 25 to March 12, 1947 being six weeks three days for which she was entitled to receive the sum of $115.71 as temporary total compensation. She was paid full salary during that time in the sum of $222.18 being an overpayment of $106.47 which must be deducted from the award.

An award is therefore hereby entered in favor of

claimant, Claudia Layman, in the sum of Eight Hundred Eleven Dollars ($811.53) Fifty-three Cents payable as follows: of this amount, $486.00 has accrued as of September 17, 1947 being 27 weeks lapsed from the date of temporary total disability. The remainder of the award, amounting to the sum of $325.53 is payable to claimant at $18.00 per week commencing on September 24, 1947.

A. M. Rothbart, Court Reporting Service, Chicago, Illinois, has entered a bill in the sum of $49.10 for taking and transcribing the testimony in this case. The court finds this charge to be fair, reasonable, and customary and said claim is allowed.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees''.

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(No. 4019—Claimant awarded $5,760.00.)

JOSEPHINE V. CAIRNS, WIDOW OF CHARLES O. CAIRNS, DECEASED: Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed September 18, 1947.*

WILLARD V. KELSEY, for Claimant.

GEORGE F. BARRETT, Attorney General; and C. ARTHUR NEBEL, Assistant, Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*employee* of *the Division of Highways within provision of Act. When an award may be made for death under Act.* Where employee of the Division of Highways sustains accidental injuries, arising out of and in the course of his employment, resulting in his death, an award for compensation therefor may be made to those legally entitled thereto in accordance with the provisions of the Act, upon compliance with the 'requirements thereof and proper proof thereof; Sec. 7, Par. **"A"** of the Act.

BERGSTROM, J.

This claim was filed on April 17, 1947 by Josephine

V. Cairns, widow of Charles O. Cairns, in her own behalf, and in behalf of her two minor children, Betty Iona Cairns and Gerald Leroy Cairns, against the State of Illinois, under Section 7 (a) of the Workmen's Compensation Act.

The record consists of the Complaint, Departmental Report, Amended Complaint, Stipulation, Claimant's Waiver of Brief and Respondent's Waiver of Brief.

The evidence shows that decedent was first employed by the Division of Highways on April 19, 1945 and worked regularly thereafter until his death on March 1, 1947. That during the night of February 28-March 1, 1947, falling snow caused the highways to become slippery. This condition caused a number of vehicles to stall on a hill on U. S. Highway No. 67 approximately 2½ miles north of Godfrey, Madison County. This group of stalled vehicles caused an extra-hazardous traffic condition. The Division of State Police requested aid from the Division of Highways in resolving the difficulty. Following this request, Mr. Cairns' highway section man, George Kruse of Brighton, and Mr. Cairns drove to the hill north of Godfrey. They spread cinders on the slippery hill, which enabled all of the stalled vehicles but one to proceed. This last vehicle, a truck owned by the Lee Transportation Company, had proceeded in a southerly direction part way up the hill 'when its wheels began to spin, causing it to stall again. Mr. Cairns and Mr Kruse walked from their truck at the bottom of the hill to the stalled truck and began to carry cinders from a stock pile on the east side of the highway and throw them under the rear wheels of the Lee truck. About 2:30 A. M. Mr. Cairns had carried a shovelful of cinders across the highway" and was spreading them in front of the rear left wheel of the Lee truck when a truck owned

by the Hayes Freight Lines, driven by Herbert Krigbaum, Quincy, Illinois, and proceeding in a northerly direction, passed the Lee truck. Because of the falling snow the driving lights of the Hayes truck were depressed and Mr. Krigbaum failed to see Mr. Cairns until it was too late to avoid striking him. Mr. Krigbaum immediately stopped his truck, assisted in removing Mr. Cairns' body from the highway, and called the State Police. About 3:00 A. M. Mr. Ralph A. Gent, Alton, Deputy Coroner of Madison County, arrived at the scene of the accident, pronounced Mr. Cairns dead, and removed the body.

The record clearly shows that decedent was injured ont of and during the course of his employment by respondent, and as respondent had immediate notice of the accident and claim was filed within six months from the time it occurred, the provisions of Section 24 of the Compensation Act have been fully met. The record also shows that the Division of Highways paid no treatment bills or compensation because of this injury.

At the time of decedent's death, his widow, Josephine V. Cairns, and his two minor children, Betty Iona born March 28, 1934 and Gerald Leroy born March 5, 1938, were totally dependent upon him for support. Decedent's earnings from the respondent for the year preceding his death were $1,800.00. Claimant is entitled to an award in the sum of $4,800.00. Since the death occurred subsequent to July 1, 1945 this must be increased 20%, making a total award of $5,760.00. The weekly compensation rate is $19.20.

An award is therefore entered in favor of claimant, Josephine V. Cairns, in the amount of $5,760.00, to be paid *to* her as follows:

$ 537.60 accrued, is payable forthwith;
$5,222.40 payable in weekly installments of $19.20 beginning on the 22nd day of September, 1947 for a period of 272 weeks.

All future payments being subject to the terms and conditioiis of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

'This award is subject to the approval of the Governor as provided in Section 3 of "an Act concerning the payment of compensation awards to State employees".

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(No. 4027—Claimant awarded $152.48.)

LEO SPELMAN AND C. R. DOTY, PARTNERS, DOING BUSINESS AS SPELMAN AND DOTY, Claimants, *vs.* STATE OF ILLINOIS. Respondent.

*Opinzon* filed *September 18, 1947.*

***Opanzon*** *on Rehearing filed December 18, 1947.*

MAX A. WESTON, for claimants.

GEORGE F. BARRETT, Attorney General and C. ARTHUR NEBEL, Assistant Attorney General, for. respondent.

COURT OF CLAIMS—*filing* of *claim* ***wzthzn*** *two years.* Where claimant sold and delivered gasoline and other products to respondent and the complaint on its face shows that said claim accrued more than two years prior to the filing of said complaint, said claim therefore is barred in part by the Statute of Limitation.

SAME—*same—Soldiers' and Sailors' Civil Relief Act.* The provision of the Federal Statute under Section 205 of the Soldiers' and Sailors' Civil Relief Act must be regarded as written into our own statutes and therefore is a stay on our Statute of Limitations which requires a claimant to file his claim within two years after it first accrued.

DAMRON, J.

This complaint was filed on May 27, 1947 by the above named claimant, seeking to recover the sum of $152.48.

The record consists of the complaint; stipulation, which provides that the report of the Department of Public Works and Buildings, Division of Highways, dated May 29, 1947, shall constitute the record in this case; the report of the Division of Highways, referred to in said stipulation; and waiver of brief and argument on behalf of both claimant and respondent.

The departmental report is in words and figures as follows:

"The above titled complaint arose out of purchases of gasoline, kerosene, grease, automotive parts, and services by the Department of Public Works and Buildings, Division of Highways, from claimants. There were **81** separate items purchased during the period February **25, 1944** and June **26, 1945,** inclusive.

Department records show that the purchases were made by Division of Highways employees; that the materials and services were furnished by claimants and used in Division of Highways equipment; that the dates, quantities, unit prices, and totals as alleged are correct; and that said unit prices were customary and usual prices prevailing at the times and places of purchase.

Invoices (sales tickets) were not presented to the Division of Highways for payment until on or about January **21, 1947.** On January **23, 1947,** claimant was told by letters (claimant's exhibit **1)** that invoices dated prior to July **1, 1945** could not be scheduled and paid from current appropriations and that it would be necessary that claimant apply to the Court of Claims for an award.

Appropriations made by the 64th General Assembly were in existence and funds available in them for payment of claimant's invoices, if they had been scheduled for payment before the lapse of said appropriations."

The complaint shows that the first delivery of gasoline products to the respondent, was on February 25, 1944, and thereafter, during that year, there were deliveries made down to and including December 18, 1944 in the sum of $84.64. Commencing January 2, 1945 and down to and including June 26, 1945, there were sold and delivered to the respondent, gasoline and other products in the sum of $67.84.

The 64th General Assembly enacted legislation to create the Court of Claims and to prescribe its powers

arid duties and repealed the Court of Claims Law approved June 25, 1917, as amended (Chap. 37, Par. 439, 111. Rev. Stat. 1945). Section 22 of this Act, which is now in full force and effect, provides as follows:

"Every claim cognizable by the court and not otherwise sooner barred by law, shall be forever barred from prosecution therein unless it is filed with the clerk of the court within two years after it first accrues . . . ."

It is well settled in this State that the power of the Court of Claims to entertain a claim against the State is purely statutory inasmuch as the State is not suable in a court of general jurisdiction and this power can be exercised only in a manner and within the limitations as prescribed by the Statute creating this Court. *Vernon Oil Company* v. *State* of *Illinois,* No. 4011.

The complaint shows on its face that all goods, wares, and merchandise, with the exception of nine items, for which claim is made herein, accrued to claimant more than two years prior to May 27, 1947, the date of the filing of this complaint, and are therefore barred by the Statute of Limitations. The following items, June 4, 1945, $2.04; June 4, 1945, $3.60; June 4, 1945, $1.50; June 4, 1945, $0.15; June 5, 1945, $1.80; June 18, 1945, $0.90; June 18, 1945, $0.90; June 26, 1945, $1.80; and June 26, 1945, $1.65; making a total of $14.34, were filed in apt time and are allowed.

An award is therefore hereby entered in favor of claimant in the sum of Fourteen Dollars Thirty-Four Cents ($14.34) and its claim for the remaining sum of $138.14 is denied.

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SUPPLEMENTAL OPINION

DAMRON, J. .

At the recent September term of this Court, an opinion was rendered in this cause allowing to the claim-

ant the sum of $67.85 and denying claims in the sum of $84.64 for the reason, "The complaint shows on its face that all goods, wares, and merchandise, with the exception of nine items, for which claim is made herein, accrued to claimant more than two years prior to May 27, 1947, the date of the filing of this complaint and are therefore barred by the Statute of Limitations.

On October 16, 1947, the claimant filed a petition for rehearing and directed our attention to the fact that we had overlooked that C. R. Doty, a member of the above co-partnership, was inducted into the Armed Services of the United States in September 1943 and continued in the Armed Services until November 29, 1945.

Section 205 of the Soldiers' and Sailors' Civil Relief Act provides: "The period of military services shall not be included in computing any period now or hereafter to be limited by law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agencies of government by or against any person in military service by or against his heirs, executors, administrators, os assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of said services . . . . ."

This provision of the Federal Statute must be regarded as written into our own statutes and therefore is a stay on our Statute of Limitations which requires a claimant to file his claim within two years after it first accrued.

That portion of the opinion rendered at the September term which allowed claimants the sum of $67.84 and holding that the remainder of said claim was barred by the Statute of Limitations is hereby vacated.

An award is hereby entered in favor of claimants in the sum of $152.48 for merchandise and supplies sold and delivered to the respondent from February 25, 1944 to June 5, 1945.

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(No. 4030—Claimant awarded $5,760.00.)

LOVELL DEAN, WIDOW OF WARREN L. DEAN, DECEASED, Claimant, vs. STATE OF ILLINOIS, *Respondent.*

*Opinion filed September 18, 1947.*

KINDER AND DEY, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent,

WORKMEN'S COMPENSATION ACT—*employee in the Department of Public Works, Division of Highways, within provisions of* ***Act.*** ***When award may be made for death under Act.*** Where employee in the Department of Public Works sustains injuries, arising out of and in the course of his employment, resulting in his death, an award for compensation therefor may be made to those legally entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof and proper proof of claim therefor.

BERGSTROM, J.

Claimant, Lovell Dean, is the widow of Warren L. Dean, who was employed by respondent in the Department of Public Works and Buildings, Division of Highways, and seeks an award for the death of her husband under the provisions of the Workmen's Compensation act.

On April 14, 1947 Mr. Dean and other men were engaged in filling pavement cracks with molten asphalt on U. S. Highway No. 66 in Nontgomery County. About 1:10 P.M. Mr. Dean mas refilling his pouring can at the rear of the kettle. A tractor-trailer transport, loaded with approximately **429** bushels of shelled corn and driven by Mr. Everett J. Woods of Sullivan, Missouri,

approached from the north. The flagman signaled to Mr. Woods to stop to permit a north bound car to pass. However, the transport disregarded the signal and continued down the highway. The flagman called a warning to the group and jumped into the ditch. Mr. Dean either failed to hear the warning or failed to respond quickly enough, for he continued to fill his pouring can at the back of the asphalt kettle. The transport continued in its course and struck Mr. Dean, pinning him between the transport and the asphalt kettle. He fell from between the two vehicles about 90 feet from the point of 'impact. Dean's superior called an ambulance to take him to a hospital. It was determined upon arrival of the ambulance that Mr. Dean was dead. The body was taken to a funeral home at Witt. There it was found that he had suffered fractures of both legs, an arm, the skull, chest injuries and the body was badly burned.

The deceased was injured during the course of and out of his employment by respondent, and the employer and employee were operating under the provisions of the Workmen's Compensation Act. The record does not present any jurisdictional questions. The deceased was survived by his widow, Lovell Dean, and two children, Thomas Dean, 3 years old, and Beverly Sue Dean, 4 months old.

Decedent's earnings from respondent during the year preceding his death totalled $1,807.83. The accident having occurred subsequent to July 1, 1945, the weekly compensation rate would be $19.20. Under Section 7 (h) Par. 3 of the Workmen's Compensation Act, claimant is entitled to an award in the amount of $4,800.00, which must be increased 20% under Section 7 (1), making a total award of $5,760.00.

An award is therefore made in favor of the claimant, Lovell Dean, in the amount of $5,760.00, to be paid to her as follows:

$ 422.40, accrued is payable forthwith;
$5,337.60, is payable in weekly installments of $19.20 per week, beginning September 23, 1947, for a period of 278 weeks.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State Employees."

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(No. 3873—Claimant awarded $3,203.97 and life pension.)

HARRY WILSON, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

*Opinaon filed November 12, 1947.*

CLARENCE B. **DAVIS,** for Claimant.

GEORGE F. BARBETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*petition filed under Section 19, Par. "H" of Workmen's Compensation* **Act.** An award and pension for life may be made under said Act, where employee sustains injuries and having been unable to pursue any gainful occupation or engage in any compensating employment since the date of his injury under Sec. **8,** Par. "F",computed in accordance with Sec. 7, Par. "A" of the Act.

BERGSTROM, J.

Claimant, Harry Wilson, filed his petition for readjustment of his claim under Section 19, Paragraph H of the Workmen's Compensation Act on February 26, 1947. In an opinion filed November 13, 1945, this Court held that the accident, through which claimant was injured on August 10, 1943, arose out of and in the course

of his emplbyment, arid awarded him $1,496.03 for total temporary disability covering a period of 84 6/7 weeks from September 1, 1943 to April 17, 1945, but denied his claim for permanent disability.

Claimant testified at the hearing held before Commissioner 'Jenkins on June 19, 1947, that he has been unable to work or earn any money since his award; that he has been receiving medical treatment ever since that time; that his physical condition has not improved, but has deteriorated, and he is suffering more; that he can only stay up two or three hours at a time during the day; and that he has been unemployed since the award. Dr William Henry Wilson testified that he had been treating claimant continuously since January 1947, and on direct examination answered as follows:

Q. As a result of your examination, can you tell the Court what you found in Mr. Wilson's condition?

A. The patient came to me and gave me a history as follows: that on the 10th of August, 1943, while working for the State of Illinois in the Judge's chamber, he was standing on a ladder doing some type of cleaning, and he slipped. He fell about ten feet, his head striking the floor and his back striking a chest of drawers which had been pulled out.

From that time until the present he has been unable to perform any type of significant duty. That was the history he related when he came to me on the 20th of January, 1947.

At the time of the examination, there was revealed marked tenderness at the base of the skull down to about the eighth dorsal vertebra. He was most tender at the point of the eighth dorsal vertebra. There was also a tenderness in the area of the right shoulder.

He stated he had gone to several physicians and osteopathic physicians, and had received various treatments. At the time he came to my office I did not get an X-ray examination, as I figured I would give him treatment and note the response, and get an X-ray check later on if necessary. Finally, on the 16th of May, his condition was apparently getting worse, and I decided to get an X-ray examination. I had taken his word for the fact he had an X-ray examination and nothing significant was shown other than some changes in the right shoulder area.

The X-ray examination at the Memorial Hospital on or about the 16th of May, **1947,** revealed an old compression fracture of the eighth dorsal vertebra. There was some caving in of the anterior of the body of the vertebra. There was some slight arthritical indication in the shoulder.

My physical examination after the X-ray examination showed essentially the same clinical finding as my examination of January **20, 1947.** He had not responded to treatment, which consisted of diathermy along with massage and intiavenous medication such as potassium iodine and colchicine. Despite all of the treatment, there was apparently no favorable result. **As** a matter of fact, it was noted the patient moved with even more difficulty and was even more careful upon arising from a sitting position.

Basing my observations upon his history and previous treatments, the treatments I gave him, the physical examination and the laboratory study, particularly X-ray examination, it is my opinion that: his is a chronic condition, and is a case of total disability, and that the patient would not be able to perform any type of duty because of this.

*Q.* Would you say, Doctor, in your opinion that this man's condition of disability is progressive?

**A.** Yes, I would say it is progressive.

Dr. J. J. Pleak, an Osteopathic Physician, who also testified at the original hearing, testified at the hearing on May 6, 1947, that claimant received treatments from him up to January 1947; that he treated him for general neuritis in conjunction with the spine; that it resulted from the injury he received; that he had a traumatic neuritis, which is the hardest one in the whole medical history on which to get results. He also testified that in his opinion claimant could not handle a position of regular employment with regular hours.

It appears from the evidence that the claimant has been unable to pursue any gainful occupation or engage in any compensating employment since the date of his original injury. From the evidence, we concur with the recommendation of Commissioner Jenkins, who personally observed the physical appearance of claimant, that claimant's disability has increased and he is now totally

aiid permanently disabled as the result of the injury he sustained while employed by respondent on August 10, 1943, and so find.

Claimant also makes claim for medical services in the amount of $99.00, X-rays in the amount of $30.00, and drugs in the amount of $8.28. As he apparently elected to provide for his own medical services, this part of his claim must be denied.

Claimant is entitled to an award under Sec. 8, Par. (f) of the Workmen's Compensation Act, computed in accordance with Sec. 7, Par. (a) of the Act, of $4,000.00 increased by 17½% under Par. (1) or $700.00, a total of $4,700.00. From this must be deducted the sum of $1,496.03 paid through the previous award, which leaves a balance of $3,203.97 payable at his compensation rate of $17.63, and thereafter an annual pension during life in the amount of $376.00 payable at the rate of $31.33 per month.

Harry L. Livingstone, Court Reporter, 1008 Ridgely Building, Springfield, Illinois, has rendered a statement for $40.20 for the taking and transcribing of the evidence. This charge is fair and reasonable.

An award is therefore entered in favor of Harry L. Livingstone for taking and transcribing the testimony in this case in the amount of $40.20, and an award is entered in favor of claimant, Harry Wilson, in the amount of $3,203.97, as follows:

$2,362.42, accrued, is payable forthwith;

$ 841.55, is payable in weekly installments of $17.63 for a period of 47 weeks beginning November 21, 1947, with a final payment of $12.94; thereafter an annual pension of $376.00 payable in monthly installments of $31.33 during the term of his natural life.

The Court hereby retains jurisdiction of this cause for the making of such other and further orders herein

that may be necessary in accordance with the provisions of the Workmen's Compensation Act.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 3881—Claimant's award terminated.)

REVY M. MARTIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Order filed November 12, 1947.*

WORKMEN'S COMPENSATION ACT—*When total permanent disability award may be set aside.* Petition by Revy M. Martin for total permanent disability, including pension for life heretofore made and this Court on June 12, 1945 found claimant's annual wage for the preceding year to be $1,500.00 and claimant being awarded total permanent disability, including a pension for life; on October 1, 1947, respondent filed its petition showing said claimant now employed and earning more than he earned prior to the injury, under Section 8, Par. "F" of the Act said award is terminated.

Now coming on to be heard the petition of the respondent filed in the above entitled cause on the first day of October, 1947, and it appearing from said petition: that an award under the Workmen's Compensation Act for total permanent disability, including a pension for life, was heretofore made to the claimant, Revy M. Martin, by this court in its opinion of date June 12, 1945; that in said opinion this court found that claimant's annual wage for the year preceding the accident in question was $1,500.00, and that in addition to the then accrued payments, claimant was entitled to $3,521.46, payable in weekly installments of $16.94 each, beginning June 12, 1945, for a period of 207 weeks with an additional final payment of $14.88; that claimant has received payments under said award at the meekly installment rate of $16.94 from June 12, 1945 to June 23, 1947, or for a period of 106 weeks; that on June 23, 1947,

claimant, Revy M. Martin, was again employed by the respondent, State of Illinois, at the Soldiers and Sailors Home, Quincy, Illinois, at a salary of $145.00 per month, which was increased to $170.00 per month on July 1, 1947; and that said claimant is now employed and earning more than he earned prior to the injury for which said award was made;

*It is, therefore, ordered, adjudged and decreed,* that the award for permanent total disability, heretofore entered herein, be, and the same is hereby terminated, and that the payments thereunder cease forthwith, all in accordance with Section 8 (f) of the Workmen's Compensation Act of Illinois.

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(No. 4009—Claim denied.)

HAROLD R. BROWN AND ALICE I. BROWN, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1947.*

RICHOLSON, WILHELM AND DAVIES, for Claimants.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

DEPARTMENT OF PUBLIC WORKS AND BUILDINGS—*damages resulting from excessive water in channel and overflow.* Claimant must present his claim within two years from time claim accrued for damages to his crop and land pursuant to Section 22 of "An Act to create the Court of Claims." Said act does not contain a saving clause in reference to claims that accrued prior to such enactment.

SAME—*statute creating liability or cause of action.* Such liability or cause of action is necessarily derived from the statute itself. The provisions with respect to time of filing such claims is a condition of liability, and cannot be maintained unless there is a full compliance with all the prescribed statutory conditions.

DAMRON, J.

Harold R. Brown and Alice I. Brown filed this complaint on February 19, 1947.

The complaint alleges that they are the owners of a one hundred thirty acre farm in Grundy County immediately adjacent to and south of the Illinois and Michigan Canal; that they acquired the property in August, 1940.

It is further alleged that many years ago the duties of maintenance, operation and repair of the Canal were transferred from the Canal Commissioners to the Waterway Division of the Department of Public Works and Buildings; that in violation of its duty the latter Department failed to keep the Canal free of foreign matter whereby for several years since 1940 excessive water accumulated in the channel and overflowed its banks submerging claimants' lands, damaging their crops and preventing them from raising crops.

Claimants allege that 2,500 bushels of corn of the value of $3,400.00 were destroyed in 1941; that during the year 1942, 8,000 bushels of the value of $12,000.00 were destroyed; that they were unable to raise crops comprising 8,000 bushels of the respective value of $12,000.00 each in the years 1943 and 1944 and that the land was damaged as to its fair cash value to the extent of $150.00 an acre, namely $19,500.00, which damages total $58,900.00.

Harold R. Brown testified that the property mas acquired in 1938; that he paid $35.00 an acre for 106 acres and $40.00 an acre for the other **24** acres. He talked to the Superintendent of the Canal in March, 1942 and several times afterwards and informed him if the gates were not left open in the spring to take care of flood water the farmers would have to handle the gates. When the gates were not open the water would overflow over his farm. This happened in October, 1941 destroying 2,000 bushels which was 25% of his corn crop. In

February, 1942 the Canal flooded again and the water was not off until June, 1942. Except for 2 acres, no corn was planted that year. The farm was flooded again in the spring of 1943 when only 10 acres mere planted. In 1944 only 5 or **6** acres were planted producing about 500 bushels. The farm was under production in 1945. The witness also testified as to numerous conversations with Mr. Pitts, the Superintendent, and others about taking care of the gates, and changing the course of Carson Creek to eliminate excess water flowing into the Canal.

Claimants contend that the evidence discloses without denial that during heavy rainfalls the water goes over the banks of the Canal which has become a shallow basin since the Canal has been abandoned for navigation purposes and that snch damage is occasioned during heavy rainfall whether the gates are opened or not. It is further contended that the State by abandonment and neglect has changed the course of the drainage and thereby damaged claimants' property and deprived them of its use and enjoyment, for which loss they should be compensated by respondent.

The respondent contends that the instant proceedings are barred by reason of the limitation provision of Section 22 of "An Act to create the Court of Claims" (approved July 17, 1945; ch. 37, Par. 439.22 Ill. Rev. Statutes) which reads as follows :

> "Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons and persons under other disability at the time the claim accrues two years from the time the disability ceases."

It appears without controversy from this record that claimants seek an award for alleged damages caused by overflowage during the years 1941, 1942, 1943, and 1944

and that no claim is asserted for any damage either to land or crops for any year subsequent to 1944.

The claim, if cognizable by this court, accrued more than two years prior to the filing of the complaint herein on February 19, 1947.

The former comparable section (Sec. 10) of the prior enactment creating the Court of Claims (approved June 25, 1917) and repealed by the present law, afforded a five year period from the time the claim accrued within which it might be filed.

No savings clause was enacted in the present law as to claims that accrued prior to such enactment.

The general rule which holds that statutes of limitation should not be given a retroactive effect, unless it clearly appears that the legislature so intended has no application to the present enactment. The statutory provision under consideration is a condition of liability and not a mere statute of limitation. Where the right of action is one created by statute and the time for filing the action is a condition of liability, it will not operate retrospectively in the absence of a manifest contrary intention. *Carlin* vs. *Peerless Gas Light* Co., 283 Ill. 142; *Spaulding* vs. *White,* 173 Ill. 127.

Even though the remedy granted claimants to enforce their rights in this court by the statute may be regarded as creating a liability upon the State, or creating a cause of action, such liability and corresponding right is necessarily derived from the statute itself. The provisions of this enactment with respect to the time for filing such claims is a condition of such liability. The action or claim cannot be maintained unless there is a full compliance with all the prescribed statutory conditions precedent. *Vernon Oil* Co. vs. *State,* No. 4011. (Opinion rendered September term, 1947.)

No department, agency or official of the State can waive the immunities of the State nor does this Court have the authority or power, indirectly or directly, to waive any condition essential to confer jurisdiction upon it to adjudicate a claim. The sole authority to do this rests with the legislature.

In the light of these basic and controlling reasons we must hold that claimants are precluded by Section 22 of the Court of Claims Law from maintaining his claim for the alleged damages caused to his property and crops during the years 1941 to 1944, inclusive.

This court, after the expiration of the two year limitation as provided in Section 22 within which .the claim must be filed, is without jurisdiction to consider such claim. Our jurisdiction is clearly limited to the consideration of claims which have accrued within two years prior to the filing of the complaint.

Because of the views above set forth, it will be unnecessary for us to comment further as to the manifest impropriety of the measure of alleged damages aggregating $58,900.00 as asserted by claimants, for the loss of 2,500 bushels of corn in 1941 on the basis of its gross pegged selling price; a potential yield of 8,000 bushels which were never planted for the succeeding years 1942, 1943, 1944 on the basis of the same figures, in addition to a depreciation of $150.00 an acre fair cash market value of the land itself, notwithstanding claimants' testimony that the value of the land would be $300.00 an acre ($39,000.00) or that they would not accept $250.00 an acre if it were not for the Canal.

The motion of the respondent to dismiss this complaint is allowed.

Complaint dismissed.

(No. 4025—Claimant awarded $4,800.00.)

DELLA CHILDERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion pled November 12, 1947.*

DIXON, DEVINE, BRACKEN AND DIXON, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*pre-existing disease.* Where pre-existing disease is aggravated or accelerated, it is compensable. *Tinkler vs. State,* 11 C.C.R., 55; *Valier Coal Company vs. Ind. Com.,* 399 Illinois, 458. Widow of employee of Department of Public Welfare at Dixon State Hospital, a watchman, who as a result of physical exertion in his course of duty died, may recover under Section 7, Paragraph A of act.

BERGSTROM, J.

Claimant, Della Childers, is the widow of George B. Childers, deceased, who was employed by the Department of Public Welfare at the Dixon State Hospital, as a watchman.

The record consists of the Complaint, Amendment to the Complaint, Departmental Report, and Waivers of Brief and Argument by Claimant and Respondent.

On January 4, 1947 Mr. Childers started out in an automobile with some other employees of the Institution to locate two patients who had escaped, which was a part of his duties as watchman. The night was extremely cold—the temperature being below zero—and while the car was in the northeast part of the town about one-half mile from the Institution, the automobile became stalled in a snow bank. Mr. Childers and the other two employees took turns in shoveling the snow and pushing the car to extricate it, which took about an hour and a half. They then returned to the main office of the Institution, and as decedent reached for the door latch, he fell over. A doctor was immediately called, and Dr. Belinson and Dr. Kamenetz came in a matter of a few min-

utes. Dr. Belinson testified that decedent died from a coronary occlusion; that the physical exertion by decedent in extricating the car and the cold weather were definite contributing factors to his death. Dr. Kamenetz testified to the same effect.

It has been held on numerous occasions that when a person's pre-existing disease is aggravated or accelerated in the course of his employment and death results therefrom, it is compensable. *Finkler* v. *State,* 11 C.C.R. 55; *Martin* v. *State,* 14 C.C.B. 189; *Valier Coal Co.* v. *Industrial Commission,* 339 Ill. 458; *Marsh* v. *Industrial Commission,* 386 Ill. 11; *Simpson* Co. v. *Industrial Commission,* 337 Ill. 454; *Vincennes Bridge Co.* v. *Industrial Commission,* 351 Ill. 444.

At the time of the accident, decedent and respondent were operating under the provisions of the Workmen's Compensation Act, and notice of the accident and claim for compensation were made within the time provided in the Act, and we find that the accident arose out of and in the course of decedent's employment.

The earnings paid to decedent by respondent for the year previous to his death aggregated $1,531.29. Claimant, therefore, is entitled to an award under Sec. 7 (a) of the Workmen's Compensation Act in the amount of $4,000.00. The accident having occurred after July 1, 1945 this must be increased 20% making a total award of $4,800.00. Decedent's average weekly wage, computed under Section 10 (a) of the Act was $29.45, and his compensation rate would be $14.73 per week, which must be increased 20%, making the compensation rate $17.68 per week. Decedent had no children under the age of 16 years dependent upon him for support at the time of his death.

An award is therefore made in favor of claimant,

Della Childers, in the amount of $4,800.00, to be paid to her as follows:

$ 795.60, which has accrued is payable forthwith;
$4,004.40, payable in weekly installments of **$17.68** beginning on November 24, 1947 for a period of **226** weeks, with an additional payment of **$8.72.**

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

Darlèen Lambert, court reporter, Dixon, Illinois, was employed to take and transcribe the evidence in this case and has rendered a bill in the amount of $15.00. The Court finds that the amount charged is fair, reasonable and customary, and that said claim be, and is, hereby allowed.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compelisation awards to State employees."

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(No. 4028—Claimant awarded $5,340.00.)

**DELLA** N. CORCORAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1947.*

ROSCOE BONJEAN, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for death of employee of the Secretary of State while employed at the Stnte House* ***power*** *plant.* Where stationary engineer at the power plant at the State House, employed by the Secretary of State, sustains accidental injuries arising out **of** and in the course of his employment, resulting in his death, an award may be made for compensation therefor in accordance with the provisions of the Workmen's Compensation Act, to

those legally entitled thereto,. upon compliance with the requirements thereof and proper proof **of** claim for same.

ECKERT, C. **J.**

The claimant, Della N. Corcoran, is the widow of Edward **J.** Corcoran, deceased, a former employee of the Secrtary of State at the State House Power Plant. On April 22, **1047,** the decedent arrived at his place of employment about 2:30 P.M., apparently in good health. His duties included the firing of four boilers, and during the afternoon lie spent considerable time cleaning the fires. For that purpose, slash bars, about ten or twelve feet long, with a blade about fifteen inches long and two and one-half inches wide, were used to knock off the clinkers. These slash bars weigh thirty pounds or better.

About 5:45 in the afternoon, James Holland, employed at the power plant as a stationary engineer, called to decedent asking for additional steam for a new engine. After a few minutes of strenuous exertion to comply with this request, the decedent came to the engine room, up steep steps from the boiler room, and there Holland found him buckled up, with one hand on the throttle, and the other on the steam chest of an engine. In answer to Holland's inquiry, the decedent said he was very sick. Holland, after putting him in a chair, called his superior for a replacement, and the decedent was sent home in a taxicab. Dr. Robert E. Smith called by an employee of the power plant, arrived at decedent's home shortly afterward. After a brief examination, Dr. Smith called an ambulance for Corcoran's removal to a hospital, but Corcoran died en route.

Dr. Smith, testifying on behalf of claimant, stated that he had been the decedent's physician for five years preceding his death; that decedent had been treated in 1945 for common cold and had come in during the fall

of 1946 for a general checkup which showed no symptoms of any kind. Dr. Smith found nothing in that examination to indicate a heart ailment. On the contrary, Dr Smith stated he found the decedent then in very good health.. Dr. Smith testified that the immediate cause of the death was a coronary occlusion, and stated that in his opinion over-exertion by the decedent, while cleaning the fires on the afternoon of April 22nd, caused the occlusion that resulted in his death.

At the time of the accident, which resulted in the death of Edward J. Corcoran, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. The record is clear that claimant's death was caused by a coronary occlusion, and that he was not suffering from any pre-existing disease which contributed to his death. The record further shows that a coronary occlusion may result from over-exertion. On the day in question, the decedent had performed considerable strenuous work in the course of his employment, particularly in the latter part of the afternoon. The hurry to finish the cleaning of the fires, to provide additional steam for the new engine, easily and logically might result in the coronary occlusion which caused his death. He suffered the attack at a place where he was in the discharge of those duties. The death, therefore, may be said to have resulted from an accidental injury arising out of and in the course of his employment, at a definite time and place within the meaning of the Workmen's Compensation Act of Illinois. *Fittro* vs. *Industrial Commission,* 377 Ill. **532, 37** N.E. 2nd, 161.

At the time of his death the decedent left him surviving Della N. Corcoran, his widow, who seeks an award,

under the provisions of the Workmen's Compensatioii Act, in the amount of $5,340.00, and two minor children, one of whom will be sixteen years of age on January 8, 1948. During the year immediately preceding his death his earnings were $2,890.00. Under Section 10a of the Workmen's Compensation Act, compensation must be computed on the basis of this annual wage, making decedent's average weekly wage $55.06, and his compensation rate the maximum of $15.00 per week, plus 20% or $18.00.

Claimant is entitled to an award under Section **7a** of the Workmen's Compensation Act in the amount of $4,450.00. The death having occurred as a result of an injury sustained after July 1st, **1945,** this amount must be increased 20%, or $890, making a total award to claimant of $5,340.00.

The testimony at the hearing before Commissioner Jenkins mas taken and transcribed by Hugo Antonacci, who has submitted a statement for his services in the amount of $54.45. This statement appears reasonable for the services rendered.

An award is therefore made to Hugo Antonacci, in the amount of $54.45, payable forthwith.

An award is made in favor of the claimant, Della N. Corcoran, in the amount of $5,340.00, to be paid to her as follows :

$ 522.00, which has accrued, is payable forthwith;
$4,818.00, is payable in weekly installments of $18.00 **per** week, beginning November 12, 1947, for a period of 267 weeks, with an additional final payment of $12.00.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4029—Claimant awarded $3,673.22.)

DORSIE L. BOHANNON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opznion filed November 12, 1947.*

PAULSON, MORGAN AND JORDAN, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award may be made for permanent* ***partial*** *loss of use of* ***rzght*** *arm and* ***right*** *leg.* Where employee **of** Department of Public Welfare at the Elgin State Hospital, Elgin, Illinois, sustains accidental injuries arising out of and in the course of his employment while within the provisions of the Workmen's Compensation Act, resulting in permanent partial loss of use of his right arm and right leg, an award for compensation may be made therefor, in accordance with the provisions thereof upon compliance by said employee with **the** requirements of said act and proper proof of **his** claim for such compensation.

BERGSTROM, J

Claimant filed his claim on June 3, 1947 for benefits under the Workmen's Compensation Act as a result of injuries which he received on October 2, 1946 while employed by the Department of Public Welfare at the Elgin State Hospital, Elgin, Illinois.

According to the evidence, claimant was employed as a regular attendant at the Elgin State Hospital and, while in the performance of his duties on October 2, 1946 he slipped and fell down a flight of stairs, causing injuries to his shoulder and hip. He was immediately hospitalized in the Infirmary, which is part of the Elgin State Hospital, and was confined there three weeks for treatment. He was treated by Dr. Manuel Schreiber who

is employed at the hospital and also by Dr. Frederick Schurmeier who is a practising physician in the City of Elgin, who, in turn, turned him over to Dr. Lyman Smith. Claimant further testified that he was 59 years old, had no wife or children, and that he has been unable to work since the date of his injury.

At the time of the accident claimant arid respondent were operating under the provisions of the Workmen's Compensation Act. Notice of the accident and claim for compensation were made within the time provided in the Act, and we find that the accident arose out of and in the course **of** claimant's employment.

Claimant makes claim for permanent total disability. The burden of proof is upon claimant, and an award must be based on facts and inferences reasonably drawn from facts proved by the evidence. Claimant's own physician, Dr. Lyman Smith, testified that in his opinion, as a result of the accident, claimant has a 75% loss of the use of his 'right arm and a 5% loss of the use of his right leg because of the above injury. He also testified that the shoulder injury could probably be corrected by surgery. The Court is unable to conclude from the medical testimony and the evidence in the record that claimant is entitled to an award based on his total permanent disability, but finds from the evidence that claimant is entitled to an award based on 75% loss of the use of his right arm and 5% loss of the use of his right leg.

Claimant's annual earnings were $1,643.03, so his weekly compensation rate mould be $15.00, which must be increased 20%, the accident having occurred after July 1,1945, making his weekly compensation rate $18.00. He is, therefore, entitled to an award for temporary total incapacity for 64 weeks at $18.00 per week or $1,152.00, 168¾ weeks at $18.00 per week or $3,037.50, for 75% loss

of the use of his right arm; and 9½ weeks at $18.00 per week or $171.00 for 5% loss of the use of his right leg; which makes a total of $4,360.50, from which must be deducted the sum of $687.28 paid to claimant for unproductive time, leaving a balance of $3,673.22.

An award is therefore made in favor of claimant, Dorsie L. Bohannon, in the amount of $3,673.22, to be paid to him as follows:

$ 356.72 which has accrued, is payable forthwith;
$3,316.50 payable in weekly installments of $18.00 beginning November 21, 1947 for a period of 184 weeks, with a final payment of $4.50.

Gertrude E. Stover of Elgin, Illinois, was employed to take and transcribe the evidence in this case, and has rendered a bill in the amount of $18.00. The Court finds that the amount charged is fair, reasonable and customary, and that said claim be, and is, hereby allowed.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4031—Claimant awarded $4,800.00.)

JENNALYN GORMAN, Claimant, *vs.* **STATE** OF ILLINOIS, Respondeat.

*Opinion filed November 12, 1947.*

VERNON G. BUTZ, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

**WORKMEN'S COMPENSATION ACT**—*when award may be made for death of employee of the Stute of Illinois employed as a painter.* Where employee worked as a painter for the State, sustained accidental injuries arising out of and in the course of his employment, resulting in his death, an award may be made to widow for compensation therefor in accordance with the provisions of the Workmen's Compensation Act, upon the compliance with the requirements thereof and proper proof of claim for same.

**DAMRON, J.**

This complaint was filed on June 14, 1947 for an award under the Workmen's Compensation Act, as amended, for the death of Richard Gerald Gorman, the husband of the above named claimant.

The record consists of the complaint, departmental report, statement, brief, and argument of claimant, waiver of statement, brief and argument on behalf of respondent and a stipulation that the report of the Department of Public Welfare shall constitute the record in this case.

The record discloses that Richard Gerald Gorman, had been employed by the respondent as a painter since April 1,1946. That on May 19,1947, he with other workmen was painting a tubular fire escape at the Kankakee State Hospital and while so engaged, a clevis, holding "bosuns chair" upon which he was sitting became loosened causing him to fall approximately 35 feet to the ground. He was given first aid treatment at the Kankakee State Hospital but died about three hours after the accident as a result of his injuries.

The record further discloses that at the time of the accident, which 'resulted in his death, he left surviving him his dependent widow, the claimant herein but no children under sixteen years of age. The record further discloses that during the pear immediately preceding the accident he received a salary from the respondent of $3,408.00 per annum. Under Section 10 (a) of the **Workmen's** Compensation Act, compensation is computed on the basis of the annual wage, making decedent's average weekly wage $65.28 and his weekly compensation rate would therefore be $18.00 per week.

Upon this record we make the following findings :

That on the 19th day of May 1947, claimant and re-

spondent were operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned, claimant sustained accidental injuries which arose out of and in the course of his employment from which he died; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent, within the time required by the provisions of Section **24** of said Act.; that the earnings of the deceased during the year preceding injury were $3,408.00 and that the average weekly wage was $65.28; that the deceased at the time of the injury was 57 years of age and left surviving him his widow, the above named claimant mho was dependent upon him for her support at the time of his death.

Claimant is therefore entitled to an award under Section 7, Par. (a) and (h) of the Workmen's Compensation Act, as amended.

An award is therefore entered in favor of claimant, Jennalyn Gorman, in the sum of Four Thousand Eight Hundred ($4,800.00) Dollars payable to claimant at $18.00 per week. Of this amount the sum of $450.00 has accrued as of November 10, 1947 and is payable forthwith. The remainder of said award amounting to the sum of $4,350.00 is payable to her at $18.00 a week commencing on November 17, 1947 for **241** weeks with the final payment of $12.00.

All future payments being subject to the terms and provisions of the Workmen's Compensation Act, as amended, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4034—Claimant awarded $4,800.00.)

MARY T. HEDIGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinaon filed November 12, 1947.*

FREDERICK L. HABBEGGAR, for Claimant.

GEORGE F. BARRETT, Attorney General, and C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*employee of the Department of Public Works and Buildings.—when death results on the course of employment—an award may be made for compensation therefor under Section 7, Par. "A"* of *Act.* Where an employee of the Department of Public Works, Division of Highways, receives accidental injuries causing his death while performing his duties, is compensable under the provision of Section 7, Par. "A" of the Act upon compliance with the requirements thereof.

ECKERT, C. J.

Claimant, Mary I. Hediger, is the widow of John T. Hediger, deceased, who was formerly employed by the Department of Public Works and Buildings, Division of Highways, as an equipment operator. On June 9, 1947 while perfgrming his duties as such operator, a road grader knocked down the decedent and passed over him. Death occurred a few hours later. Claimant, as widow of the deceased employee, seeks an award for the death of her husband under the provisions of the Workmen's Compensation Act.

At the time of the accident, which resulted in the death of John T. Hediger, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this state, and notice of the accident and claim for compensation were made within the time provided by the act. The accident arose out of and in the course of decedent's employment.

Decedent had been employed by the respondent continuously for more than one year prior to his death at

a salary of $2,040 per annum. Under Section 10 (a) of the Workmen's Compensation Act, compensation must be computed on the basis of this annual wage, making the decedent's average weekly wage **$39.23,** and his compensation rate the maximum of $15.00 per week. The death having occurred subsequent to July **1,** 1945 this must be increased 20%, making a compensation rate of $1800 per week. The decedent had no children under sixteen years of age dependent upon him for support at the time of his death.

Claimant is therefore entitled to an award under Section 7 (a) of the Workmen's Compensation Act in the amount of $4,000.00, which must be increased 20%, making a total award of $4,800.00.

An award is therefore made in favor of the claimant, Mary **I.** Hediger, in the amount of $4,800.00, to be paid to her as follows:

$ 396.00 which has accrued and is payable forthwith;
**$4,404.00** **is** payable in weekly installments of $18.00 per week, **beginning** November 10, **1947,** for ***a*** period of **244 weeks** with **an** additional final payment of **$12.00.**

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

**(No.** 4041—Claimant awarded **$5,785.00.)**

**HELEN F. FREDRICICSON,** WIDOW OF **GEORGE** L. **FREDRICKSON, DECEASED,** Claimant, *us.* **STATE OF ILLINOIS,** Respondent.

***Opinion filed*** *November* ***12,*** *1947.*

JOHN F. GIBBONS, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATIOX ACT—*death of employee* of *Department* of Public *Safety, Division of State Police, compensable under Section* 7, Par. *"A" of Act.* Where an employee receives accidental injuries resulting in his death, arising out of and in the course of his employment, his widow and daughter may **be** awarded compensation under act upon their compliance with the requirements thereof.

DAMRON, J.

This claim mas filed in this Court October **1,** 1947, by claimant, Helen F. Fredrickson, on her behalf as widow and on behalf of Dolores A. Fredrickson, born January 19, **1932,** the daughter of George L. Fredrickson, deceased.

The record consists of the complaint, departmental report, stipulation, waiver of brief of claimant, and waiver of brief of respondent.

The stipulation provides that the report of the Department of Public Safety dated October 7, 1947, signed by Harry L. Curtis, Superintendent of the Division of State Police, shall constitute the record in this case.

Said report is in words and figures as follows:

"Prior to, his death, Mr. George L. Fredrickson resided with his wife, Helen F., and one child, Dolores A., born January 19, **1932,** who were totally dependent upon him for support.

Mr. Fredrickson was first employed by the Department of Public Safety, Division of State Police, on March 24, **1944,** as a police officer at a salary of $185.00 a month. He was regularly employed in that capacity from the date of his first employment until the date of his death, September **1, 1947.** During his period of employment he received salary increases, and on July **1, 1947,** his salary was $235.00 a month.

Earnings in the year preceding Mr. Fredrickson's injury resulting in death totaled $2,600.00.

The night of August 31-September 1, 1947, Officer Fredrickson was one of a group assigned to a special detail at Pere Marquette State Park. About 5:10 A.M. September 1, 1947 Officer Fredrickson, together with Officers Durward I. Williams and Jack P. Drew, was sitting in a car parked on a driveway near the park entrance. At this time Mr. Charles E. Woolsey, of Godfrey, Illinois, rode up on a motorcycle and asked aid for a man who had been in a motorcycle accident 1½ miles east of the park on S.B.I. Route 100 in Jersey County.

The officers drove to the site of the accident where they found that a motorcycle had struck an electric power pole breaking it off. The injured man was lying at the side of the road, and the power lines were hanging close to the ground between the body and the highway.

The officers got out of their car. At about 5:20 A.M., while darkness prevailed, Mr. Fredrickson started toward the body, but became entangled in the live wires. Officers Williams and Drew attempted to release Officer Fredrickson from the wires while Officer William C. Culberth drove to a telephone to have the current turned off. The current was turned off at approximately 5:29 A.M., and the body was removed from the wires immediately thereafter and was taken by ambulance to the Jacoby Funeral Home, Jerseyville, where Dr. B. M. Brewster pronounced the officer dead.

The State has not made any expenditures in connection with Officer Fredrickson's death."

Upon consideration of this case, the Court finds it has jurisdiction of the parties hereto and of the subject matter; that the injury which resulted in the death of claimant's intestate arose out of and in the course of his employment; that the respondent had proper notice of the accident and death of claimant's intestate and application for claim was filed in apt time as provided under Section 24 of the Workmen's Compensation Act, as amended. We further find from this record that the deceased's annual earnings during the year immediately prior to his death amounted to the sum of $2,600.00 making his average weekly wage amount to the sum of $50.00. His weekly compensation rate therefore would be $19.50 under the Workmen's Compensation Act, as amended and in force July 18, 1947.

We further find that under Section 7 (a) of the Act, claimant is entitled to an award.

An award is hereby entered in favor of claimant, Helen F. Fredrickson, in the sum of $5,785.00. Of this sum there has accrued to November 10, 1947, the sum of $195.00 being 10 weeks at $19.50 per week which is payable forthwith to her in lump sum.

The remainder of said award amounting to the sum of $5,590.00, is payable to claimant, Helen F. Fredrickson, at a weekly rate of $19.50 commencing November 17, 1947 for 286 weeks with one final payment in the sum of $13.00.

The future payments herein above set forth, being subject to the terms of the Workmen's Compensation Act of Illinois, jurisdiction in this cause is hereby retained for the purpose of making further orders that may be from time to time necessary.

This award being subject to the provisions of an Act entitled "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved June 30,1941, and being by the terms of such Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from Road Fund in the manner provided for in such Act.

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(No. 3290—Claim denied.)

HARTMANN-CLARK BROS. COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed November 12, 1947.*

*Petition of* **Claimant** *for* **rehearing** *denied December* **18,** *1947.*

DENT, WEICHELT AND HAMPTON; HODGES AND TRAGETHON, and E. V. CHAMPION, for Claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, WILLIAM L. MORGAN, WILLIAM J. COLOHAN, Assistant Attorneys General, for Respondent.

CONTRACTS—*performance delayed due to failure of State to furnish cement therefor—award for damages resulting therefrom not justified where faalure due to exmbitant prices being fixed by manufacturers —State within sovereign rights—public policy.* Where State entered into a series of contracts for the construction of concrete highways, and undertook to furnish the cement therefor, and in the interest of the general public delayed doing so, for the reason that cement contractors were demanding excessive prices for same, it was justified on the ground of public policy, and acted within its sovereign rights, and will not be held liable for any damages resulting from such delay, as the rights of the general public must prevail over any rights of an individual. *O'Keefe* vs. *State,* 10 C. C. R. 480, and *Madison Construction Company* vs. *State,* **11 C.** *C.* **R. 64,** followed, and reaffirmed.

OFFICIAL ACTS—*immaterial whether wrztten or verbal.* **If** an act of the official, in whom is vested the supreme executive power of the State, is authorized, it is immaterial whether it **was** written or verbal in the absence of a constitutional or legislative provision prescribing documentary authentication.

CONSTITUTION—*acts* of *Governor in relation to impairment of contractual obligation in violation of Art. II Section 14 of the Constitution of Illinois, and in relation to deprivation of contractual rights without due process of law in contravention of the 5th Amendment to the Constitution of the United States.* When the State of Illinois is sued as a contractor on a contract entered into by its Highway Department, it cannot be held liable for an obstruction to the performance of its contract resulting from its public and general acts as a sovereign, whether legislative or executive. *Horowitz* vs. *United States,* **267 U.** *S.* **458, 69 I,.** Ed. **736.** Such official acts performed for the public welfare preclude recovery, notwithstanding the fact that a claimant suffered damage.

CH. **121, ILLINOIS REVISED STATUTES, (1945), SEC. 30** provides that the Department of Public Works and Buildings may reject any and all proposals and advertise for new proposals if in its opinion the best interests of the State will thereby be promoted.

CONTRACTS—*absence of an express provision.* In the absence of an express provision in the specifications upon which a contract was let by the State whereby the State covenanted and warranted. to furnish cement at a particular time, such warranty will not be implied.

ECKERT, C. J.

During the year 1932, claimant, a general building contractor, having its principal office at Peoria, Illinois, entered into a series of nine contracts with the State of

Illinois, for the coiistruction of certain concrete highways. Under the terms of these contracts the respondent agreed to furnish the necessary cement. Claimant thereafter began work, supplying, transporting, and installing the necessary machinery, tools and equipment at the situs of the work, securing workmen and laborers, and perfecting an organization in connection with each contract until it was forced to suspend operations because of respondent's failure to supply cement. Claimant alleges that this failure interrupted and delayed the prosecution of claimant's work; that it prevented claimant from completing its work in an orderly, usual, and economical manner, and in sequence; that it caused claimant's men and equipment to remain idle; and that it compelled claimant to pay an increased cost of gasoline, materials and labor. The total damages claimed are in the amount of $137,649.92.

The contracts provided that the work be done according to the Standard Specifications for Road and Bridge Construction of the Division of Highways, adopted January 2, 1932. Work was begun on six of the contracts in the fall of 1932, and was suspended in November and December when all work was shut down for the winter season. During the month of February, 1933, respondent notified claimant to file requisition for cement requirements on this projects not later than March 1st, and claimant accordingly thereafter filed requisitions for cement, requesting delivery by April 10th to April 14th. Claimant was ready to proceed with the paving work at that time, and in two instances two adjoining contracts were to be worked with the same paving units and equipment. The cement, however, was not made available to claimant when requested, and was not furnished until the 26th of June for three contracts,

not until the 28th of June for three other contracts. and not until the 7th of July for two contracts.

From the time claimant was ready to proceed with the paving, until the cement was available, all of claimant's equipment and organization mere idle. Continued requests were made of the respondent during that period, and conferences were had between claimant and the Division of Highways. Claimant alleges that as a result of respondent's failure to furnish cement as and when requested, claimant's equipmeiit and organization remained idle a total of 310 days. The fair rental value of this equipmeiit, based upon the schedule of Equipment Ownership Expense, published by the Associated General Contractors of America, would be $63,990.34.

Another element of damage alleged by claimant is general overhead amounting to $38,753.10. This amount was determined by computing its overhead for the year 1933, which, based on an eight month construction season, amounted to $15,001.75 per month. This was divided among four paving units, amounting to $3,750.44 per unit, or a total expense of $125.01 per paving unit per day.

Claimant also alleges a loss of profits which it contends it could have earned during the period of idleness. This was found by taking the average profit for the preceding six years, which, based on an eight month construction season, and allocated to four units, amounted to $53.39 per day per unit, or a total of $16,550.90.

Other damages sought by the claimant consist of the following items :

| | |
|---|---|
| Transporting paving unit to Altamont, Illinois, at the direction of respondent | $ 884.21 |
| Maintaining night watchman | 124.61 |
| Moving paving unit to Marshall County.. | 1,628.14 |
| Rented equipment idle from April 14th to June 20th, 1933. | 3,666.89 |
| Maintaining skeleton crew during delay. | 2,022.61 |

| | |
|---|---|
| Cost of cleaning brick | 209.04 |
| Equipment rental, R. Balton during delay | 2,557.20 |
| Increased cost of labor-wage scale | 2,659.74 |
| Increased cost of gasoline | 2,645.86 |
| Increased cost of paving due to winter operations | 424.90 |
| Cost of straw curing method made necessary due to delay in furnishing cement | 972.57 |
| | $17,795.77 |

In its answer, the respondent has alleged that during January 1933, "as a result of the persistent collusion by cement producers and others to impose exorbitant prices for cement and to induce and cause collusive bidding," respondent by "executive order" refused to accept bids on cement; that it was not until June 15, 1933, that the respondent mas able to procure cement through competitive bidding; that the conspiracy and collusion by cement producers and others prevented the State from obtaining and delivering cement to the claimant; and that the State of Illinois, as a sovereign commonwealth, is not liable to claimant in damages for any delay caused by such executive order, or its failure to deliver cement to claimant during the periods complained of.

The claimant contends, however, that the respondent presented no evidence of any "collusion" or "conspiracy", and presented no evidence that the respondent was prevented from delivering cement to claimant during this period. Claimant contends that the evidence shows that there was abundant cement in the market; that the companies were overstocked; that the price of bids was fair and in line with the then commercial market; and that the bids protected the State against any increase during the year.

At the hearing before Commissioner Blumenthal, Robert Kingery, former Assistant and Acting Director

of the Department of Public Works and Buildings, testifying on behalf of the respondent, stated that on January 20, 1933 the respondent advertised for bids returnable February 27th; that seventeen companies submitted bids, and that the bids received were uniform at an average statewide bid of $1.62 per barrel at point of delivery; that he had a conference with Mr. Lieberman and Mr. Hathaway, Engineer of Construction, to discuss what action should be taken; that it was agreed that they would reject the bids, but took the matter up with Governor Horner; that he told the Governor at that conference that the bids were 68c per barrel higher than the bids in 1932, but that during the preceding year there had been what was known as a ((cementwar," and that the companies bidding in 1932 had bid prices which were, in his judgment, lower than the cost of cement; that he thought a fair price might be somewhat over $1.25 per barrel, but considered $1.62 out of line; that the Governor asked what his recommendation was, and that he recommended the bids be rejected and that the Governor told him to reject "those bids." Accordingly, he rejected the bids, and advertised for new bids, returnable March 27th, 1933.

The new bids were likewise $1.62 per barrel, and were again uniform. The same procedure was followed, and the bids were again rejected. It was then decided to advertise for bids for cement f.o.b. at the factory, returnable April 12th, 1933. The same bids were received as those for delivery at destination. Another conference was had with the Governor, and he directed these last bids be rejected as they were irregular. This was dons.

Thereafter, Mr. Kingery arranged with 'three professors of the University of Illinois to make a study of

the cement situation. They visited cement plants in Pennsylvania, Indiana and Illinois, and with the full co-operation of the cement companies, obtained factual records for a report to the Governor as to the cost of manufacturing cement. About June 15th or 16th, the respondent contracted for the purchase of cement with the Marquette Cement Company, at a price, Mr. Kingery testified, that was lower than the previous bids, and was for less than two-thirds of the required amount.

The record contains evidence as to the cost per barrel of cement to the state each year from 1919 to 1933, and considerable evidence as to conditions in the cement market during the years 1932 and 1933. This evidence, obviously, was intended to indicate that the action of the Department of Public Works and Buildings, and the action of Governor Horner, were warranted by the facts. Neither the wisdom of the Governor, nor the wisdom of the Acting Director, however, is for determination by this court. It is neither necessary nor proper to question the judgment of the Governor or of the Acting Director; no suspicion of bad faith on the part of either state officeris suggested by the record.

It is likewise clear that claimant was guilty of no default or breach, and was ready, willing and able to complete performance of its contracts; that it was unreasonably delayed in so doing by failure of the State to perform. When a claimant thus sustains a loss through no fault of its own, but occasioned solely by the State, the State is liable for the actual damages sustained. (*The Strandberg Brothers Company, A Corporation,* vs. *State of Illinois, 8* C.C.R. 87; *The Carson-Payson Company* vs. *State of Illinois, 8* C.C.R. 581; *Willadsen,* et *al.* vs. *State of Illinois,* 8 C.C.R. 604; *Belding* vs. *State of Illinois,* 12 C.C.R. 438.)

The respondent contends, however, that when the State, in the interests of the general public, delays the furnishing of cement because it believes that cement contractors are demanding excessive prices, it is justified upon the grounds of public policy, acts within its sovereign rights, and is not liable for damages resulting from such delay. This defense rests upon the principle that the rights of the general public must prevail over any rights of an individual, and was stated by this court in the cases of *J. P. O'Keefe Company* vs. *State* of *Illinois,* 10 C.C.R. 480, and *Madison Construction Company* vs *State of Illinois,* 11 C.C.R. 64.

The claim in the *O'Keefe case* was in three parts: the first item was for additional compensation for stone excavation; the second item was for delay caused by the failure of a private corporation to furnish and maintain adequate equipment; and the third item was for delay in furnishing cement. The delay in furnishing cement in that case arose out of the same facts as the delay in this case. The court there said: "It was a matter of common knowledge that the cement producers were demanding exorbitant prices from the State for cement. The people of the State of Illinois were vitally interested. It might well be assumed that cement manufacturers knew that the State had agreed to furnish cement to numerous contractors, and that contracts were then in existence for, public improvements which the State had entered into. It also might well be assumed that the public officials of the State of Illinois, through its Chief Executive, the Governor of the State of Illinois, rightfully felt that the action of the cement manufacturers or dealers was such as to make those public improvements so costly as to be prohibitive and against public policy"

The court then discussed the meaning of "public policy", and concluded that: "The exorbitant price demanded by cement manufacturers affected the whole State of Illinois, and it must be conceded that such action was injurious to the public. This claim for damages arising from the fact that the State could not furnish cement must be denied on the grounds of public policy.

"It may be contended that in repudiating any liability on behalf of the State for its failure to furnish cement under the circumstances in this case is an unconscionable act. The answer to this is that in a situation of this kind the interest of the public, rather than the equitable standing of individual parties, is of determining importance, and we base our opinion upon principles of public policy and to conserve the public welfare."

The claimant here, however, contends that although it is clear that O'Keefe was not entitled to recover for delay in furnishing cement, because of his own default, this court, in its opinion, went further than was necessary. and commented upon matters not raised by the pleadings or brought out by the evidence. Claimant contends that that part of the decision which discusses the State's failure to supply cement is *obiter dicta;* A careful reading of the opinion, however, indicates that the liability of the respondent for failure to furnish cement was clearly at issue, and that the liability of the respondent was denied by the court on the ground that the respondent acted within its sovereign rights when it delayed the furnishing of the cement in the interests of the general public.

The *Madison Construction. Company case* is likewise in point. Under the contract in that case the State was to furnish the cement necessary for the improvement in

question; upon completion of all necessary preliminary work the claimant requested the respondent to furnish cement in accordaiice with the contract; the respondent authorized the claimant to procure the necessary cement, but subsequently withdrew its authorization, so that the claimant was compelled to suspend operations from April 27, **1933** to June 27, **1933.** An award was denied on the ground that claimant, by accepting final payment had released the respondent from all claim for damages. **A** rehearing was granted, and in the opinion on rehearing the court followed the decision of the *O'Keefe case.*

The court there said: "It appears from the record in this case that the State had entered into a contract with the claimant at a time when the price of cement was satisfactory to all concerned, and as we understand it, it is common practice to let contracts of this character at various seasons of the year, and at times when the contract is not to be performed for several months. The questions here presented are of much importance for those reasons. The exorbitant prices demanded by cement manufacturers affected the whole State of Illinois. This claim for damages arising from the fact that the State could not furnish cement could, therefore, be denied on the grounds of public policy."

After discussing cases in which the rights and duties of a sovereign were involved, the court said: "Basing our conclusions on the language of the Supreme Court of the United States in the *Horowitx case, supra, (Horowitz* vs. *United States,* 267 U. *S.* **458,** 69 L. Ed. 736), we must hold that when the State of Illinois is sued as a contractor on a contract entered into by the Highway Department, it can not be held liable for an obstruction to the performance of a particular contract, resulting from

its public and general acts as a sovereign." The claim was accordingly denied.

Claimant, however, contends that the *O'Keefe case* and the *Madison Construction Company case,* if in point, should be overruled; that the decisions in those cases are erroneous because there as here, there was no proclamation or executive order. It is true, there was no formal written order or proclamation by the Governor, but it is equally true that the Governor ordered the Director of the Department of Public Works and Buildings to reject bids, and that pursuant to such direction the bids were rejected. The mere existence or absence of a formal document is certainly not the test for determining the validity of the official action. If such act of the official in whom was vested the supreme executive power of the State was authorized, it is immaterial whether it was written or verbal in the absence of a constitutional or legislative provision prescribing documentary authentication.

But claimant, further contends that even if such executive order had been issued, the Governor was without any legal power or authority to take such action and thereby impair the contractual obligation in violation of Art. II, Sec. 14 of the Constitution of Illinois, or thus to deprive claimant of his contractual rights without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

The legal principle set forth in the *Horowitz case, supra.* is the answer to this contention. It is there stated: "It follows, therefore, that when the United States appears as a contractor it cannot be held liable for an obstruction to the performance of its contract resulting from its public and general acts as sovereign whether legislative or executive."

It follows, therefore, that the question in this case, as in the *O'Keefe case* and the *Madison Construction Company case* is whether or not the act of the Governor, in directing the then acting Director of Public Works and Buildings to reject the bids for cement, under the circumstances disclosed by the record, was an official, public, general and authorized act of the Governor as the head of the Executive Department of our State Government. The *O'Keefe* and the *Madison Construction Conzpaizy cases* clearly hold that it was such an official act, an act performed for the public welfare which precludes the claimant from recovering notwithstanding the fact that he suffered damage.

Furthermore the statutes of the State of Illinois (Ch. 121, Sec. **30,** Ill. Rev. Statutes **1945)** provide that the Department of Public Works and Buildings "may reject any or all proposals, and may at once advertise for new proposals as hereinbefore provided, if in its opinion the best interests of the State will thereby be promoted.'' The Department of Public Works and Buildings is established by legislative enactment ; its Director is appointed by the Governor; it is essentially a division or arm of the Executive Department,. Article V, Section 6, of the Illinois Constitution provides that the supreme executive power shall be vested in the Governor, ''who shall take care that the laws be faithfully executed."

When the Director of Department of Public Works and Buildings, after conference with the Governor, and presentation of the facts in relation to the bids received in February and March, **1933,** recommended the rejection of such bids, and the Governor directed him to reject the same, the Governor was discharging his constitutional duties in the enforcement of this statute.

The validity and the propriety of the Governor's

action is not to be tested by anything more than the facts then confronting him. Subsequent events or judicial determination of the innocence or culpability of cement manufacturers does not constitute the criterion as to the legality for his action. The Federal Trade Commission later did make a finding that the cement manufacturers in question were guilty of a conspiracy, and although the Circuit Court of Appeals subsequently reversed that finding, a perusal of the opinion in that case reveals the complexity of the problem involved. The accuracy of this observation is further confirmed by the Supreme Court in issuing its writ of certiorari to review that record. Obviously the Governor can not be required to act with judicial deliberation and exactitude under such circumstances. This court is not called upon in this case to pass upon the merits of the controversy involving the cement producers. The Governor at the time acted within his constitutional power in rejecting proposals to promote the best interest of the State, as he saw it, in good faith.

Despite the persuasive and extensive briefs and arguments, and despite the urging of claimants that the *O'Keefe* and the *Madison. Construction Company cases* are not controlling here, and if controlling should be overruled, this court is of the opinion that the principle followed in those cases is correct. The decisions in those cases are reaffirmed, and found to be controlling here.

Although we have discussed at considerable length the applicability of the *O'Keefe* and the *Madison Construction cases,* aside from the principle of those cases, and aside from any question of the power of the sovereign to act as in this case, an award would not be possible. The contracts in question contained the Standard Specifications for Road and Bridge Construction of the

Division of Highways, adopted January 2, 1932. Section 6.6 of those Specifications states: "The Department will furnish the portland cement." Section 6.6 (a) *(3)* states: "The Department assumes no responsibility for the delivery of the cement at the time desired, nor will extra compensation be allowed the Contractor for the non-delivery of the same when required." In Section 4.3 of the specifications, the Department reserves the right to alter the quantities of work to be performed or to extend or shorten the work, provided the total price for all such alterations, extensions, or deductions does not exceed 25% of the original contract price. In Section 4.4 the Department also reserves the right to make such changes in the plans and in the character of the **work** as may be necessary or desirable to insure completion in the most satisfactory manner, provided such changes do not materially alter the original plans and specifications.

The case of *U. S.* v. *Foley,* U. S. 91 L. ed. 135, reached the Supreme Court on certiorari to review a judgment against the Federal Government upon a claim by an electrical contractor for damages occasioned by delay in making available certain airport runways upon which his work was to be done. The majority opinion in that case reversed the Court of Claims, and much of what was said in that opinion is applicable to the contractual provisions above quoted. The Supreme Court there said:

"In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time.' **Cf.** *United States* v. *Blair,* **321** U. S. **730, 733, 734, 88 L.** Ed. **1039, 1042,** 1043, **64** S. Ct. **820.** It is suggested that the obligation of respondent to complete the job in **120** days can be inverted into a promise by the Government not to cause performance to be delayed beyond that time by its negligence. But even if this provision standing alone could be stretched ***to*** mean that the Government obligated itself to exercise the highest degree of diligence and the utmost **good** faith in efforts to make the runways promptly available, the facts **of** this case would show no breach **of** such an undertaking.

For the Court of Claims found that the Government's representatives did this work 'with great, if not unusual, diligence,' and that 'no fault is or can be attributed to them.' Consequently, the Government cannot be held liable unless the contract can be interpreted to imply an unqualified warranty to make the runways promptly available.

"We can find no such warranty if we are to be consistent with our Crook and Rice decisions (WS) *supra*. The pertinent provisions in the instant contract are, in every respect here material, substantially the same as those which were held in the former cases to impose no obligation on the Government to pay damages for delay. Here, as in the former cases, there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to ooordinate his work with the other work being done on the site, and clearly contemplated that he would take up his work in the runway sections as they were intermittently completed and paved."

Even if it may be said that the provision of Section 6.6 (a) (3), absolving respondent of any responsibility for non-delivery of cement when required, contemplated only delays by the mill or in transportation, there is no express provision elsewhere in the specifications whereby the Department covenanted or warranted to furnish the cement at any particular time. In the absence of any such express warranty, and in view of Sec. 6.6 (a) (3), and the other quoted provisions, which contemplated the possibility of delays on the part of respondent, the situation disclosed by this record invokes the rule enunciated in the *Foley* case and precludes claimant from an award.

For the reasons stated, the claim is, therefore, denied.

(No. 3944—Claim denied.)

MYRTLE **H. HELLER,** Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

*Opinion filed* ***November*** *12, 1947.*

*Petition* ***of*** *claimant* ***for*** *rehearing denied December 18, 1947.*

SEWELL AND PETTY, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*partial dependency.* **A** mere showing of parentage or lineal relationship raises no presumption **of** dependency but whether there is dependency under Par. "C" **of** the act is a question of fact to be established **by** claimant. *Wedron Silica Co.* vs. *Industrial Commission,* 312 Ill. 118.

SAME—*dependency.* The word dependency implies a present existing relation between two persons, where one looks to or relies on the aid of another for support consistent with dependent's position in life. Claimant failed to disclose legal liability on mother's part to support her and voluntary contributions cannot be construed as a legal liability to support claimant's invalid husband.

*SAME—proof.* An award must be based upon facts and evidence and cannot rest upon conjecture, speculation or surmise.

DAMRON, **J.**

This claim is brought by Myrtle H. Heller for benefits under Section 7, paragraph (c) of the Workmen's Compensation Act. The record consists of the complaint, departmental report, motion of claimant for an extension of time, transcript of evidence, reporter's bill, abstract of evidence, brief of claimant, brief and argument of respondent, and claimant's reply brief.

The record discloses that claimant's mother, Anna Certz, was employed for a number of years as a cook at the Chicago State Hospital and in the early morning of January 29, 1945, she attempted to light a gas stove in said institution. The explosion which followed caused the door to blow open which struck her on the top of her legs between the knees and the hips. Mrs. Gertz was given first aid at the hospital by Doctor Cohen and

was hospitalized at the institution for several days and on February 16, **1945,** she died.

This claimant, Myrtle H. Heller, was also employed in this Chicago State Hospital, receiving a salary of $85 00 per month and $20.00 per month for maintenance. The testimony of claimant discloses that she lived in her mother's house with her invalid husband and that her mother lived in the Chicago State Hospital. That while the claimant and her husband occupied her mother's house, the mother made no charge for rent and also periodically assisted her in other expenses of the household.

This claim is based primarily on the help that was given to claimant by her mother during her lifetime inasmuch as the claimant testified she could not wholly support her husband on the salary she was making.

Evidence further discloses that the invalid husband died a short time after claimant's mother died.

Generally speaking, the question of partial dependency is one of fact. Those dependent upon an employee killed by an accidental injury sustained while in the course of and arising out of his employment, belong to a class entitled to compensation. Sec. 7(c).

The right to relief is purely statutory. *If* the condition or relation authorizing an award of compensation does not exist, the award as a matter of law, cannot be sustained. One claiming an award as a dependent on another, must show by the evidence that she was sustained by or relied for support on the aid of the other, or looked to her for support and relied on her for reasonable necessaries consistent with the dependent's position in life, *Alder, Coal* Co. vs. *Industrial Commission,* **293** Ill. 597, and that she was to a substantial degree, supported by the employee at the time of her death. *Pratt* Co. vs. *In-*

*dustrial Commission,* **293** Ill. **367** ; *Keller* vs. *Industrial Commission,* **291** id **314;** *Peabody Coal* Co. vs. *Industrial Commission,* **311** id **338;** *Lederer Co.* vs. *Industrial Cornmission,* **321** id **563.**

The evidence of claimant fails to disclose legal liability on the part of her mother to support her and we must construe her evidence as showing that her mother made voluntary contributions periodically which in no sense can be construed as partial dependency or a legal liability on the part of her mother to support claimant's invalid husband.

**It** is well settled in law that a mere showing of parentage or lineal relationship raises no presumption of dependency but whether there is dependency under paragraph (c) of the Act is a question of fact to be established by the claimant. *Wedron Silica Co.* vs. *Industrial Commission,* **312** Ill. **118;** *Peterson* vs. *Industrial Commission,* 315 id **199.** The word "dependency" implies a present existing relation between two persons, where one is sustained by another or looks to or relies on the aid of another for support or for reasonable necessaries consistent with the dependent's position in life. *Wasson Coal Company* vs. *Industrial Commission,* 312 Ill. **241.** The test is whether the contributions were relied upon by the claimant for her means of living judging by her position in life, and whether she was to a substantial degree supported by the employee at the time of the latter's death. *General Construction. Conzpaizy* vs. *Industrial Commission,* **314** Ill. 58; *Peabody Coal Company* vs. *Industrial Cornmission* supra ; *Pratt Company* vs. *Industrial Commission* supra.

An award must be based upon facts and evidence and cannot rest upon conjecture, speculation, or surmise.

The evidence does not establish the claimant's partial dependency upon the earnings of the deceased.

The Attorney General contends that there is no dependency shown by this evidence and we agree with this contention.

The claimant having failed to establish by the evidence that she is entitled to an award, her complaint must be dismissed.

Award denied.

A. M. Rothbart, Court Reporter, has filed a bill for reporter services in this case in the sum of $51.00 supported by affidavit. The bill appears reasonable for the services rendered and is hereby allowed.

Award is hereby rendered in favor of A. M. Rothbart in the sum of $51.00.

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(No. 4017—Claim denied.)

KATHRYN S. CLARK. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opanaon filed November 12. 1947.*

*Petition of Claimant for rehearing denaed December 18, 1947.*

CLAIMANT, *pro* se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*Section 24:* Where employee filed her claim more than one year after the date of the accident where no compensation has been paid or within one year after the date of last payment of compensation where any has been paid, employee cannot recover under Act.

BERGSTROM, J.

Claimant, Kathryn S. Clark, who filed her claim April 2, 1947 for payment of medical and hospital bills under the provisions of the Workmen's Compensation

Act, was employed by respondent in the Department of Public Aid Commission, Division of Standards and Services.

The record consists of the Complaint, Departmental Report, Stipulation, and Waivers of Brief and Argument by Claimant and Respondent.

Claimant was qualified as Visitor I, and her duties consisted of investigating and determining original and continued eligibility of applicants for various types of public assistance; interviewing. applicants, their relatives, and others in connection with investigations and case services, checking various public records, and other information; preparing complete written reports covering case information; preparing assistance budgets according to established policies and recommendiig assistance awards; interpreting public aid progress to applicants, recipients and other persons and agencies in the community. Her duties required her to travel by automobile and by various forms of public transportation.

On September 25, 1945 claimant, in the performance of her duties, made a visit to the home of Mrs. Effie Bell Warden, an Old Age Pension recipient, in Noble, Illinois, and after completing her visit and while leaving the premises, she slipped on the board walk leading from the home of Mrs. Warden to the sidewalk, breaking her left leg at the ankle. Immediately thereafter she was taken to the Olney Sanitarium, Olney, Illinois, for medical attention and treatment.

Claimant and respondent were operating under the provisions of the Workmen's Compensation Act, and we find that claimant's injuries were sustained through an accident arising out of and in the course of her employment by respondent.

The ,record shows that claimant was employed July

2, 1945 and was paid the sum of $378.15 for services rendered to September 25, 1945—the date of her incapacity. The record also shows that she was absent from work from the date of her injury, September 25, 1945, to March 31, 1946, and that she received full salary for this period of her total temporary disability.

Under the provisions of the Workmen's Compensation Act, claimant has obviously been overpaid for this period of her total temporary disability, but from the record we are unable to determine the amount she received in salary covering this period, nor does it show the annual earnings which persons of the same class and the same employment as hers received from the Department, as provided in Section 10, Paragraph C of the Act. However, as this claim must be denied for the reasons hereinafter stated, these facts which would otherwise be pertinent, need not be considered.

The only claim made by claimant is for payment of medical care and attendance incurred by her as a result of this injury, namely, $167.50 to Dr. Frank C. Weber, Olney, Illinois, and the sum of $386.95 to The Olney Sanitarium, Inc., Olney, Illinois, for services rendered from September 25, 1945 to July 19, 1946. Claimant was permitted to secure such medical services with the full approval of respondent.

The record shows that claimant was injured on September 25, 1945, and received full salary to March 31, 1946, which was over one year prior to the filing of her complaint on April 2, 1947.

Section 24 of the Workmen's Compensation Act provides that claim must be filed within one year after the date of the accident where no compensation has been paid, or within one year after the date of last payment of compensation where any has been paid. It has been

repeatedly held by this Court, and the Supreme Court,' that the making of claim for compensation and filing application therefor within the time fixed by Section 24 of the Workmen's Compensation Act, is a condition precedent without which the Court of Claims does not have jurisdiction to enter an award. As this claim was filed over a year after the accident or the payment of any compensation, it must be denied.

The claim is therefore denied.

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**(No.** 4024—Claimant awarded **$755.50.)**

JAMES WILSON, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

***Opinion filed December** 18, **1947.***

CASSIDY, SLOAN AND CRUTCHER, for Claimant.

GEORGE F. BARRETT, Attorney General; and **C. ARTHUR** NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*partial permanent* ***loss of*** *use* ***of*** *right leg.* Where an employee of the Department of Public Welfare while driving a tractor from Peoria State Hospital to the gardens of the institution and while crossing a driveway was struck by an approaching automobile and received injuries to his right leg—an award of 15% partial permanent *loss* of use, under the act ***is*** justified.

ECKERT, C. J.

On June 25th, 1946, the claimant, James Wilson, an employee of the respondent in the Department of Public Welfare, while driving a tractor from the Peoria State Hospital to the gardens of the institution, and while crossing a driveway, was struck by an approaching automobile. Immediately after the accident, he was taken to the Peoria State Hospital where he received medical care for a period of five months. He was then sent to the nurse's **home** where he remained until January 17,

1947. On April 18, 1947 he resumed his employment at the Peoria State Hospital.

At the time of the accident the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. Claimant has one child under sixteen years of age.

Claimant, testifying in his own behalf, stated that he sustained injuries to his back, his pelvis and his jawbone; that the front of his right hip is flat; that he has a protrusion, and also a large lump on his back. He stated that there is stiffness and weakness in his right leg, which tires easily, and that he has a bit of a limp. He testified that as a result of being dragged along the blacktop road he has a scar over the right eye and a scar between the jawbone and the right ear. On cross-examination, claimant testified that there is nothing wrong with his right arm, his right knee, his right ankle, or his right leg, and that his injury is confined to the area surrounding his right hip.

Dr. Fred Stuttle, a witness called on behalf of claimant, testified that he had examined and treated the claimant, and had examined X-ray plates taken of claimant's injuries. He stated that the X-rays and his clinical examination showed a fracture of the right iliac crest; that the last X-rays showed a good union of this fracture in the lumbar sacro region with a narrowness of the disk of the fifth lumbar and sacro. He stated that there is some sclerosis of the bone in this region, and a spasm of the muscles of the low back. Dr. Stuttle testified that the narrowing of the disk was doubtless a condition existing before any injury; that the existence of muscular spasm mas an indication of a painful stimulation arising

from this region; and that the narrowing of the disk allows a settling of the joint between the vertebrae in the lumbar sacro region with some arthritis, which he felt was aggravated by the injury.

Dr. Stuttle also testified that the displacement of the illium affects the function of the hip. He stated:

"The bone which was displaced has certain muscles attached to it. They all go down the leg and have to do with the function of the hip and somewhat of the knee. The man does show evidence of shortening of this muscle in that he has shortening of the most important muscle, the tensor fascia lata. That is the muscle which is about the size of a hand attaching from the anterior superior spine, which was part of the bone broken off and going from this region to a broad flat band of fascia, which is a thick coating of the outer thigh on the outer side."

Dr. Stuttle also said that he considered claimant's condition to be permanent.

Claimant's annual earnings during the year immediately preceding the injury were $1,422.43, so that his weekly wage was $27.35. Since claimant had one child under sixteen years of age, his compensation rate, under the provisions of the Workmen's Compensation Act, is 55% of this weekly wage, or $15.04. The injury having occurred after July 1, 1945, this must be increased 20%, making his compensation rate the maximum of $18.00 per week.

Claimant was temporarily totally disabled for a period of 42 1/7 weeks. At the compensation rate of $18.00 per week, he would be entitled, for that period, to an award of $758.57. He had, however, already received from the respondent, for unproductive time, the sum of $584.57, so that there is due claimant a balance of $174.00 on account of temporary total disability.

The record fails to sustain any claim for facial disfigurement, for back injury, or for complete or partial permanent disability. It is clear, however, that claimant has sustained a loss of use of his right leg, and that he

has properly incurred medical expenses in the amount of $37.00. From the testimony, and from the report of Commissioner Jenkins, who observed the claimant, the court finds that claimant has sustained a 15% partial permanent loss of use of his right leg.

The testimony at the hearing was taken and transcribed by Mary I. Reynolds, who has submitted a statement fbr her services in the amount of $31.50. This statement appears reasonable for the services rendered

An award in the aggregate amount of $755.50 is therefore entered, payable as follows, to-wit :

To Mary I. Reynolds, for taking and transcribing testimony, $31.50, payable forthwith.

To claimant, on account of temporary total disability, the balance of $174.00, payable forthwith.

To Dr. Fred Stuttle, for medical services, $37.00, payable forthwith.

To claimant, for 15% partial, permanent loss of use of his right leg, being 28% weeks, at $18.00 per week, $513 00, all of which has accrued, payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4033—Claimant awarded $2,160.00.)

CHARLES W. YOUNG, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed December 18, 1947.*

CLAIMANT, *pro* se.

GEORGE F. BAKRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

. WORKMEN'S COMPENSATION ACT—*100% loss of use of left eye.* Where an employee of the Department of Public Works and Buildings, Division of Highways, as a common laborer, while removing broken portions of the paved surface of U. S. Highway 36 and a small piece of

**concrete strikes claimant's left eye, upon compliance with the provision of the act, is compensable.**

. BERGSTROM, J.

Claimant, Charles W. Young, filed his complaint on August 2nd, **1947** for loss of the use of his left eye resulting from an accident which occurred on March 18, **1947.**

He was employed by respondent in the Department of Public Works and Buildings, Division of Highways, as a common laborer. On March 18, **1947** claimant **was** engaged in removing broken portions of the paved surface of U. S. Highway **36** and making temporary patches with a bituminous mix. He placed his pick under the edge of a V-shaped piece of broken concrete to pry it loose from the surrounding pavement, and as he pried back on his pick a small piece of concrete broke off and struck claimant in his left eye. The foreman took him to Dr. Harry O. Pope, who treated him for a lacerated **cornea,** and the following morning, March **19, 1947,** took claimant to Dr. T. P. Leonard, an eye, ear, nose and throat specialist in Decatur. On July **5, 1947** Dr. Leonard submitted his final report to the Division of Highways, as follows:

**"Nature of Injury—Intraocular foreign body in left eye, traumatic cataract. Treatment—Removal of intraocular foreign body, linear extraction of cataract. X-rays—3/19/47, 3/22/47, 4/4/47. Date patient was discharged—June 6, 1947. Date able to work—April 24, 1947. Permanent disability—100 per cent loss of vision in left eye. O. S. 20/400."**

From the record, we find that claimant was injured during the course of and out of his employment, and as all jurisdictional requirements have been satisfied, he is entitled to the benefits as provided in the Workmen's Compensation Act.

Claimant is married but has no children. His earnings in the year preceding his injury were **$1,803.30.** His compensation rate would be the maximum of **$15.00** per

week, which must be increased 20% to $18.00 per week, the accident having occurred subsequent to July 1, 1945. He was paid $84.86 for total temporary disability for the period of March 19, 1947 to April 20, 1947 inclusive. All medical, hospital and nursing bills were paid by respondent in connection with this injury, totalling $691.15.

We find from the evidence that claimant has suffered a 100 per cent loss of vision in his left eye, and is entitled to receive the sum of $2,160.00, based on 120 weeks at his compensation rate of $18.00 per week.

The sum of $100.00 should also be paid to the Treasurer of the State of Illinois for the special fund provided in Section 7, Paragraph E of the Workmen's Compensation Act and as 'authorized under Section 8, Paragraph E, Sub-paragraph 20 of the said Act.

An award is therefore entered in favor of claimant, Charles W. Young, in the sum of $2,160.00, payable as follows :

$ 540.00, which has accrued and is payable 'forthwith;
$1,620.00, payable in installments of $18.00 per week for 90 weeks, commencing November 24, 1947.

An award is also entered for the sum of $100.00, payable to the Treasurer of the State of Illinois.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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**(No.** 4040—Claim denied.)

GILBERT E. KOERNER, Claimant. *vs.* STATE OF ILLINOIS, Respondent.

***Opinion filed December 18, 1947.***

**CLAIMANT,** *pro se.*

**GEORGE F. BARRETT,** Attorney General; and C. **ARTHUR NEBEL,** Assistant Attorney General.

WORKMEN'S COMPENSATION ACT—*loss of first phalanx.* Where an employee of the Department of Public Works and Buildings, Division of Highways, while guiding a piece of lumber into a power-driven jointer caught the distal phalanx of his third middle finger in the revolving blade and the evidence showed loss of one-fourth of the distal end of the phalanx of claimant's Fight middle finger, there is no legal basis for an award of one-third loss of a finger. *Macon County Coal Company* vs. *Industrial Commission,* 367 Ill. 458.

ECKERT, C. J.

On April 3, 1947, the claimant, Gilbert E. Koerner, an employee of the respondent in the Department of Public Works and Buildings, Division of Highways, while guiding a piece of lumber into a power-driven jointer, caught the, distal phalanx of his third middle finger in the revolving blade. Immediately following the accident, Dr. David J. Lewis of Springfield, Illinois, rendered first aid and amputated a portion of the distal phalanx of the injured finger. Claimant returned to limited duties the day following the injury and continued to work throughout the period of his convalescence.

At the time 'of the accident, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the, accident and claim for compensation were made within the time provided by the act. All medical services were paid by the respondent, and no claim is made for temporary total disability. Claimant, however, seeks an award for approximately a 33⅓% loss of the third finger of his right hand.

On April 3, 1947, Dr. Lewis submitted a report to the respondent in which he stated that claimant had lost about one-fourth of the distal phalanx of the injured finger; that about one-half of the proximal nail remained On May 16, 1947, Dr. Lewis reported that the laceration was completely healed; that there was a loss of the tip of the distal phalanx involving about one-third of the

length of the normal nail; and that the bony loss was about one-fourth of the distal end of the distal phalanx. There is no evidence of any loss of use.

The Illinois Workmen's Compensation Act provides that the loss of the first phalanx of a finger shall be considered a loss of one-half of such finger. Here, the question is what coiistitutes the loss of the first phalanx. In the case of *McMoi ran & Co.* vs. *Industrial Commission,* *290* Ill. 565, the Supreme Court held that the loss of one-sixteenth of an inch of the first joint of a finger is not the loss of the first phalanx. The court pointed out the distinction between cases in which only a small tip of the bone is taken without the destruction of the use of the first joint of the finger, and cases in which a substantial portion of the first phalanx is amputated. In the case of *Ide* vs. *Paul & Timmins,* **179** N.Y. App. Div. 567, where a workman sustained the loss of one-fourth of an inch of the bone of the index finger, and one-eighth of an inch of the bone of a secoiid finger, the New York Court held that an award for the loss of the first phalanx was not justified. In the case of *Geiger* vs. *Gotham Can Co.,* 164 N.Y. Supp. 678, it was held that the loss of one-eighth of an inch of the bone of the first phalanx of the second finger did not coiistitute the loss of the phalanx within the meaning of the Workmen's Compensation Act. To the same effect is the case of *Thomson* vs. *Sherwood Shoe* Co., 164 N.P. Supp. 865, where a workman lost approximately one-fourth of an inch from the tip of one of his fingers.

In the case of *Macon County Coal Co.* vs. *Industrial Commission,* 367 Ill. 458, one-third of the bone of the distal phalanx of the second finger of an employee's right hand was removed by the attending physician following an accident, and the employee's finger, after healing,

was three-eighths of 'an inch shorter than the corresponding finger of his left hand. The finger nail had grown back to half of its former size, and the flesh at the end of the finger had been restored to a point approximately even with the end of the nail. The employee testified that his finger was tender, and that there mas limitation in the flexion of the first joint. The arbitrator and the Industrial Commission found that the injury amounted to the loss of the first phalanx of the second finger, and the Supreme Court held that these findings were well within the evidence, and should not have been reversed by the Circuit Court "especially in view of a voluntary admission of partial liability by defendant in error." The court held that there was an actual loss of a substantial portion of the employee's finger, which entitled him to statutory compensation as if he had lost one-half of his finger.

From these decisions it appears that the loss of a small fractional part of the first phalanx of a finger does not constitute the loss of one-half a finger. The court is of the opinion that it would be unreasonable to hold that the loss of one-fourth of the distal end of the phalanx of claimant's right middle finger, involving about one-third of the length of the normal nail, is a loss of the first phalanx. Furthermore, there is no legal basis for an award for a 33⅓% loss of a finger, which claimant here seeks. (*Macon County Coal* Co. vs. *Industrial Commission, supra.)*

'The claim is therefore denied.

(No. 4043—Claimant awarded $4,800.00.)

LENA CORNALE, WIDOW OF MATTHEW M. CORNALE, Claimant, *vs.*

STATE OF ILLINOIS, Respondent.

*Opinion filed December 18, 1947.*

ROOT AND HOFFMAN, Attorneys for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*death of State employee compensable under Section 7 Paragraph "A".* Where an employee of the Department of Public Works and Buildings, Division of Highways, receives injuries in the course of his employment, causing his death, his widow may be awarded compensation under Section 7, Paragraph "A" of said Act.

DAMRON, J.

The record in this case consists of the complaint, report of the Division of Highways, and waiver of brief, statement, and argument, on behalf of claimant and respondent. It is stipulated by and between the parties hereto that the report of the Division of Highways filed November 5, 1947, shall constitute the record.

The report of the Division of Highways shows that Matthew M. Cornale was an employee of the Department of Public Works and Buildings, Division of Highways, since June 1, 1941 and continued such employment without interruption until April 8, 1947. For more than one year next preceding said date, he received a monthly salary of $184.00 and the year prior to April 8, 1947 received a total of $2,208.00 as wages from the respondent.

The report further discloses that about 2:10 P. M on April 8, 1947 the said Matthew M. Cornale and a fellow employee, Benjamin Dorman, were engaged in a highway maintenance operation known as dragging shoulders. This is accomplished by attaching a spike

drag to the right rear of a truck. The truck is their driven on the pavement at the right edge and the drag is wholly on the highway shoulder. Mr. Cornale was driving the Division truck and Mr. Dorman rode in the cab with him. Mr. Dorman was holding the cab door on the right side in an open position so that he could observe any surface obstructions that might interfere with the drag.

The truck was proceeding southwesterly on U. S. Route 66 at about five miles an hour. The location is approximately one mile north of the village of Gardner, Grundy County, and 1,100 feet south of the viaduct over the Alton Railroad tracks. A south bound truck driven by Gerald Byerson and occupied by the owner, Maurice Benkendorf, drove into the left rear of the Division's truck forcing it off the highway to the right. It came to 'rest in the ditch. The Benkendorf truck came to rest to the left and the rear of the Division's truck. The claimant's intestate, Cornale, was thrown out of the truck to the left and onto the left shoulder. When found, the body was under the truck about midway between the left front and rear wheels. An ambulance was summoned. A Deputy Coroner arrived at the scene of the accident a short time after it occurred and found that Mr. Cornale was dead.

The complaint shows that Matthew M. Cornale at the time of 'his death was 59 years of age and left surviving him Lena Cornale, his widow and claimant herein. The complaint further alleges that the respondent had notice of the accident on the date of the injury which resulted in Mr. Cornale's death.

From this record we make the following findings; that on the 8th day of April, **1947,** the claimant's intestate and the respondent were operating under the

provisions of the Workmen's Compensation Act; that on the date last above mentioned, he sustained accidental injuries which arose out of and in the course of his employment; that the respondent had immediate notice of the injuries and death of claimant's intestate and that claim for compensation was made on said respondent within the time required under the provisions of Section 24 of the Act; that the earnings of claimant's intestate during the year next preceding the injury which resulted in the death were $2,208.00 and his average weekly wage was $42.46, making his weekly compensation rate amount to the sum of $18.00.

An award is hereby entered in favor of Lena Cornale, the widow of Matthew M. Cornale, in the sum of $4,800.00 payable at $18.00 a week, as provided under Section 7, Paragraph (a) of the Workmen's Compensation Act. Of this amount, the sum of $666.00 has accrued representing 37 weeks from the date of his death, which is payable forthwith to claimant in a lump sum. The remainder of said award, amounting to $4,134.00 is payable to claimant at $18.00 a week for 229 weeks, commencing December 24, 1947 with one final payment of $12.00.

This award is subject to the approval of the Governor, which is hereby, if and when an approval is given, made payable from the appropriation from the Road Fund.

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically retained for the entry of such further orders as may from time to time be necessary.

(No. 3956—Claimants awarded $872.64.)

B. C. SCHUEMANN, H. E. BUHMAN AND E. C. JACKSON, ASSIGNEES OF THE ILLINOIS OIL CO., A CORP., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opanzon filed September 18, 1947.*

*Petition of Claimant for Rehearing denied November 12, 1947, Chief Justice Eckert not joining in denial.*

*Petition of Claimant for Reconsideration denied January 13, 1948.*

BERTRAND C. SCHUEMANN, for Claimant.

GEORGE F. BARRETT, Attorney General, and C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

LIMITATIONS—*time for filing claim for recovery of overpayments—is based on Section 22, Court of Claims Act.* (Chapter 37, Section 439.22, Ill. Revised Statute) which reads as follows: "Every claim cognizable by the Court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless it is filed with the Clerk of the Court within two years after it first accrues, saving to infants, idiots, lunatics, insane perspons, and persons under other disability at the time the claim accrues two years from the time the disability ceases."

BERGSTROM, J.

Illinois Oil Company, a corporation, filed its claim on July 30, 1946 for the sum of $7,869.19. Subsequent to that time, on January 29, 1947, it filed a motion through its attorney, requesting that B. C. Schueman, H. E. Buhman and E. C. Jackson be substituted as party claimant in the name, place and stead of the Illinois Oil Company, a corporation. The basis of the motion, which this Court allowed, is that the corporation is in liquidation and that by assignment properly executed by the officers of the corporation, authorized by proper corporate resolution which is part of the record, this claim was assigned to the said parties.

The claimant, Illinois Oil Company, a corporation, was a duly licensed distributor under the Motor Fuel

Tax Law of the State of Illinois, and up to and including July **1945,** it made its reports and remittances to the Motor Fuel Tax Division of the Department of Revenue. In accordance with the provisions of the said Motor Fuel Tax Law it filed its final return for the month of July **1945.** The claim now made is for over-payments made from October **1942** to and including April **1945,** less certain under-payments, caused by clerical errors in computing the gallonage on which tax was due.

The evidence clearly substantiates the contention of claimant and clearly supports the claimed over-payment of **$7,869.19.** Similar claims by licensed distributors under the Motor Fuel Tax Law have been approved by this Court, and the Court has held that the collection and payment of this tax to the State by claimants in similar circumstances was as an agent of the respondent, fulfilling the certain duties imposed upon the licensed distributors by law, and as the over-payments were made under a mistake of fact, claimants were entitled to a refund of the over-payments.

*Silver Fleet Motor Express, Inc.* vs. *State of* ***Illinois,*** **10 C.C.R. 396;**
*Edwin T. Breen as Trustee of the Worth Refining Company, Inc.* **vs.** *State,* **12 C.C.R. 285;**
*Mitchell and Hills* vs. *Btate,* **12 C.C.R. 317.**

This claim clearly comes within the provisions of the law as heretofore interpreted by this Court.

However, the Attorney General raises the question that that portion of the claim based on errors in reports made prior to July **30,** 1944 are barred by the Statute of Limitations. He bases his contention on Section **22,** Court of Claims Act (Chapter **37,** Section **439.22,** Ill. Rev. Stat. **45)** which reads :

**"Every claim cognizable by the court and not otherwise sooner barred by law shall be forever barred from prosecution therein unless**

it is filed with the clerk of the court within two years after it first accrues, saving to infants, idiots, lunatics, insane persons, and persons under other disability at the time the claim accrues two years from the time the disability ceases."

Counsel for claimant argues that this section is strictly a Statute of Limitations and as such should be construed for its prospective effect and should not be applied with reference to its retroactive effect. On page 691 of Volume 37 of Corpus Juris the general rule with reference to statutory interpretations of Statutes of Limitation is stated as follows:

"As a general rule—a fundamental rule for the construction of statutes — Statutes of Limitations will not be given a retroactive effect unless it clearly appears that the Legislature so intended;

citing

*Carlin* **vs.** ***Peerless Gas and Light Company,*** **283 Ill. 142;**
*George* vs. *George,* **250** Ill. 251;
*Walker* vs. *People,* **202** Ill. **34;** and other cases.

In the case of *George* v. *George,* 250 Ill. 251, in discussing the act which reduced the time for filing of a writ of error from five to three years, the Court said on page 255:

"In addition to the general rule that limitation acts will not be given a retroactive effect, in the absence of clear legislative intention, Section **4** of the Act to revise the law in relation to the construction **of** Statutes provides that no law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any right accruing or claim arising under the former law, or in any manner whatever to affect any right accruing or claim arising before the new law took effect."

The instant case would present no difficulty in its determination if the said Section **22** could be construed by itself and as strictly a Statute of Limitations. The weight of authority will unquestionably support the view that it would have no retroactive effect. The question presented here, however, is whether this particular section can be construed by itself or whether it must be construed in conjunction with the complete Court of

Claims Act. The Court of Claims Act, under which the present Court is functioning, went into effect on July 1, 1945. The Court of Claims is strictly a creature of the Statute, and all of its powers and duties are derived by and through the said Act. The jurisdiction of the Court is circumscribed by the Act, and every section of the Act is just as much a part thereof as the said Section **22.** AS another part of the said Act, there is Section **24** which reads :

**"An Act to create the Court** of **Claims and to prescribe its powers and duties, approved June 25, 1917, as amended, is repealed. All claims pending in the Court** of **Claims created by the above Act shall be heard and determined by the Court created by this Act in accordance with this Act. All of the records and property** of **the Court** of **Claims created by the Act herein repealed shall be turned over as** soon **as possible to the Court created by** this **Act."**

By reading of this section, there seems to be 110 question that the Legislature intended to repeal the former Act, which is further evidenced by the fact that they retained jurisdiction in the court of pending claims but were silent with respect to unfiled claims not barred under the previous five year limitations contained in the prior Act, but which would now be barred by the two-year limitation contained in said Section **22.** In construing said Section 22, this Court must do so in conjunction with Section **24** and all of the other sections of said Act. It is well settled in this State that the power of the Court of Claims to entertain a claim against the State is purely statutory inasmuch as the State is not suable in a court **of** general jurisdiction and this power can be exercised only in a manner and within the limitations as prescribed by the Statute creating this Court. Our existing powers are derived entirely from the new Act, and this Court's jurisdiction to hear any claims is derived exclusively from the new Statute and can be exercised only in the manner and under the limitations prescribed by the said

Statute. As such it operates as a limitation on the jurisdiction of this Court.

An analogous situation was presented in the case of *Carlin* v. *Peerless Gas and Light Company,* 283 Ill. 142, where the Court said on page 144:

"At common law no right of action existed in anyone to maintain an action against any person or corporation causing the death of another by any wrongful act, neglect or default. A right of action for such causes was given by our Injuries Act, which was adopted in **1853,** and which for the first time in this State created such cause of action and provided in whose name the suit should be brought and how any money recovered should be distributed. The act fixed the time within which such an action should be brought at two years after the death. Similar statutes are in force, we believe, in all the States of the Union, and the question whether the time fixed by the statute for bringing such actions is a statute of limitations has been passed upon by many courts, and it has generally, if not universally, been held that the statute creates a new liability unknown to the common law, fixes a time within which the action may be commenced, and is not a statute of limitations; that the time fixed for commencing the cause of action created by the statute is a condition of the liability, and operates as a limitation of the liability itself and not of the remedy, alone."

*The Harrisburg,* **119** *U.* S. **199;**
*Rodman* vs. *Missouri Pacific Railway* Co. (Kan.) **59** L.R.A. **704;**
*Partee* **vs.** *St. Louis & San Francissco Railroad Co.,* **123** C.C.A. **292;** 51 **L.R.A.** (N.S.) **621;**
*Gulledge* vs. *Seaboard Airline Railroad. Co.,* **(N.C.) 125** Am. St. Rep. **544; 8** R.C.L. **801-805; 8** Am. & Eng. Ency. of Law, 875.

In *Spaulding* v. *White,* 173 Ill. **127,** this court considered the question whether the amendatory act of **1895,** fixing the time within which a bill might be filed to contest a will at two years instead of three years, (the time allowed by the former act) applied to cases where wills had been probated prior to the amendment. In that case the will had been admitted to probate March **28, 1894,** and a bill was filed to contest it in March, **1897.** When the will was admitted to probate the statute gave three years' time in which to file a bill to contest it, and the bill was filed within three years from the probate of the will. The amendment of **1895** reduced the time to two years, and if the amended act applied the bill was not filed within the time limited. The court said, in substance, that the jurisdiction to entertain a bill to contest a will was derived exclusively from the statute and could be exercised only in the manner and under the limitations prescribed by the statute, and that the time allowed for filing such a bill is not a limitation law.

The court said: "There is a material distinction between a statute conferring jurisdiction and fixing a time within which it may be exercised, and a statute of limitations." That case was followed and its reasoning adopted in *Sharp* v. *Sharp,* 213 Ill. 332.

In the case of *Hathaway* v. *Merchants Loan and Trust Company,* 218 Ill. 580, a clear clistinction is made between statutes conferring jurisdiction and fixing the time in which it may be exercised and a statute of limitations. That case held, "the time in which a bill may be filed, under the Statute, by any person interested, is not a limitation law and the statute in force at the time of the filing of the bill is the statute conferring jurisdiction and must govern."

In *Merlo* v. *Johnston City Coal and Mining Company, 258* Ill. *328,* the court said, "it is a well established rule that no one has a vested right in a particular remedy or mode of procedure for the redress of grievances, and the legislature may change these and the changed procedure may be applied to pending causes."

Under the existing Court of Claims Act, claimant lost its right to action for refunds under the five year limitation and can now only recover for claims accruing to it within two years of the filing of the complaint herein, namely from July 30, 1944, that date being two years prior to the filing of this complaint.

For the reasons stated, the Court will deny that portion of the claim based on errors in reports made prior to July 30, 1944, and will only consider that portion of the claim based on errors in reports made subsequent to said date. According to the record this amounts to $1,064.01, from which amount must be deducted the sum of $191.37 admitted by the claimant to have been underpaid.

An award is therefore made in favor of B. C. Schuemann, H. E. Buhman and E. C. Jackson (assignees of

Illinois Oil Company, a corporation), in the sum of $872.64.

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(No. 2682—Claim denied.)

S. G. COOL COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March 16, 1948.*

A. C. LEWIS and EDWARD C. KESLER, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L MORGAN, Assistant Attorney General, for Respondent.

DAMAGES—*loss arising from the failure to furnish cement pursuant to contract.* Where by stipulation it is agreed that final payment to claimant has been made and further stipulated that the "Standard Specifications for Road and Bridge Construction'' adopted January, 1932, are by inference incorporated as a component part of the Contract out of which this claim for damages arises by reason of the State's failure to furnish cement; and no contention by claimant or any evidence offered as to any waiver of release under Section 9, Article 7 of said "Standard Specifications" prevents claimant from recovering his damages.

*Urech* vs. *State,* **8 C.C.R. 212;**
*Midwest Construction (lo.* vs. *State,* **9 C.C.R. 443;**
*Henkel Construction* **Co.** vs. *State, 10* **C.C.R. 538;**
*Strandberg & Son Co.* **vs.** *State,* **13 C.C.R. 49.**

DAMRON, J.

The complaint in this case was filed June 17, 1935. This court is asked to grant an award to the claimant in the sum of $616.28 extra expenses alleged to have been incurred by the claimant by reason of the respondent's failure to furnish cement required for ,the completion of a construction contract.

The contract was awarded to claimant on November 7, 1932 for the construction of a bridge in Logan County and is identified as State Bond Issue Route 121, Federal Aid Project, No. 2-163, Section 116 B, Contract No. 5027..

The testimony of George C. Whitty, President of

claimant corporation, shows that work was started on this project in December 1932 and completed in August, 1933. The State failed to furnish cement in April 1933 upon the request of claimant and work was suspended on May 18, 1933. On that date coiistruction mas completed except for surfacing the roadway. Shipment of cement was resumed about June 30, 1933 and work was then continued to completion.

This witness further testified in reference to machinery and equipment which was left by claimant at the site during the time he was unable to work due to the lack of cement, and the rental value thereof, amounts paid to maintain watchmen and other items comprising the alleged damages.

It is stipulated between the parties through their respective counsel that a final estimate.was prepared and scheduled by the State Auditor for payment to claimant on November 13, 1933; that State warrant No. 222078 in the sum of $1,939.18 evidencing final payment was issued by the State Auditor November 16, 1933, payable to S. G. Cool Co., a corporation, the claimant herein; the said warrant was endorsed by the claimant-corporation and was deposited for payment through the First National Bank of Chicago, November 17, 1933 and was paid and marked cancelled by the State Auditor on November 18, 1933.

It is further stipulated by and between the parties hereto that the "Standard Specifications for Road and Bridge Construction" adopted January 1932 are by reference incorporated as a component part of the contract out of which this claim arises. Division I, Section 9, Article 9.7 of these Standard Specifications provides as follows :

"The acceptance' by the contractor of the last payment as aforesaid shall operate as and shall be a release to the Department from

all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act or neglect of said Department relating to or connected with this contract."

There is no contention by claimant or any evidence offered as to any waiver of this release provision.

The contractual provision above quoted is identical with other claims which have been decided by this court in which we have held that the acceptance of final payment by the claimant constituted a full release of all claims growing out of contracts such as the one before us. *Urech* vs. *State,* 8 C.C.R. 212; *Midwest Construction Company* vs. *State,* 9 C.C.R. **443;** *Henkel Construction Company* vs. *State,* 10 C.C.R. **538;** *Strandberg and Son* Co. vs. *State,* **13** C.C.R. **49.**

The law as enunciated in the above cases is controlling here. Award denied.

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(No. 3999—Claimant awarded $749.70.)

ALLEN GALLOWAY, Claimant, vs. STATE OF ILLINOIS. Respondent.

***Opinion filed March 16. 1948.***

VAN PEURSEM AND MCNEILLY and HENRY S. PETZ, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*loss of use of raght foot.* Where an employee of the Department of Public Works and Buildings, Division of Highways, while trimming trees fell and received injuries and having complied with all provisions of said act and the evidence establishes 33⅓% loss of use of his right foot, an award is justified.

ECKERT, C. J.

On August 24, **1945,** the claimant, Allen Galloway, an employee of the respondent in the Department of Public Works and Buildings, Division of Highways, while trimming trees and picking up 'debris from the

highway right of way along U.S. Route 52 in LaSalle County, near Troy Grove, Illinois, slipped backward from a rubble wall, and turned his right ankle. Following the injury, claimant, at the instruction of his foreman, went to see Dr. W. M. Avery, in Mendota, Illinois, who prescribed an elastic bandage and rest.

On September 28, 1945, a representative of the Division of Highways called on Mr. Galloway and found his ankle still swollen and painful. An X-ray was taken at St. Mary's Hospital, LaSalle, the following day; it disclosed an incomplete fracture of the external malleolus and a small periosteal chip of the internal malleolus apparently due to a tendon rupture.

Claimant's ankle failed to improve, and on December 3, 1945, he was sent to Chicago and placed in the care of Dr. H. B. Thomas, professor emeritus of Orthopedic Surgery, Illinois University, School of Medicine, who ordered physiotherapy treatments. These treatments were begun December 28, 1945 and continued until February 5, 1946. On February 15, 1946 claimant was discharged by Dr. Thomas, and on that day compensation payments for temporary total disability, begun on August 26, 1945 were terminated. The respondent also paid medical and travelling expenses in the total amount of $98.85.

At the time of the injury, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. The accident arose out of and in the course of decedent's employment.

Dr. W. M. Avery, testifying on behalf of claimant; stated that the injury received by claimant, considering his age, constituted a permanent injury, and that claim-

ant would not again be able to 'pursue his usual course of employment. Dr. Avery, however, had not examined claimant since November 1945 when the ankle was still stiff and swollen.

Dr. C. O. Harris, of Mendota, testifying on behalf of claimant, stated that he first examined claimant on December 18, 1946; that claimant then had limited motion in his ankle joint; that there was tenderness and pain; that an X-ray showed no evidence of an old or recent fracture, but showed an indistinctness between the joints of the tarsal bones and in the right ankle joint. Dr. Harris's diagnosis, was arthritis, probably traumatic, and arteriosclerosis. He found restrictions in all motions of the ankle to the extent of 25 to 35%. Dr. Harris also stated that he had examined claimant just prior to the hearing on April 29, 1947, and found the condition of claimant's ankle unchanged; that claimant could do no type of work involving the use of his right foot or ankle, but could do work that would not involve such use. He considered claimant's condition permanent, and stated that in his opinion 40% of claimant's disability was due to his 'age (he being a man 78 years old) and 60% was the result of the accident.

From the testimony, and from the report of Commissioner Jenkins, who observed claimant at the hearing, the court finds that claimant has not sustained, as a result of the injury, a total permanent disability, but that claimant has sustained a 33⅓% permanent partial loss of use of his right foot. Under the provisions of the Workmen's Compensation Act, he is therefore entitled to 50% of his average weekly wage for a period of 45 'weeks. On the basis of his annual earnings, which were $1,443.94, his average weekly wage was $27.76. He had no children under sixteen years of age dependent upon

him for support. His compensation rate is thus $13.88. Since the injury occurred subsequent to July 1, 1945 this must be increased 20%, making a compensation rate of $16.66 per week. Claimant has been fully paid for his

and reasonable.

An award is therefore entered in favor of Helen Zawacki in the amount of $15.00 which is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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**(No.** 4022—Claim denied.)

JOHN B. TOMASHESKI, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

*Opinion filed March 16, 1948*

LONDON G. MIDDLETON, for Claimant.

GEORGE F. **BARRETT,** Attorney General; and **C.** ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*proof.* Where claimant alleges negligent treatment **of** his injury by doctors at Peoria State Hospital he must present evidence of same.

SAME—*proximate cause.* Where a condition is negligently **permitted** to exist, but some intervening act causes an injury to occur in connection with such a condition, the intervening act and not the existing condition is the proximate cause **of** the injury. Where a pa-

tient suffering from epileptic attacks and while an inmate in the State Institution, during one of his attacks grabbed an unprotected steam pipe resulting in injury, such an accident is one that could not reasonably have been anticipated; the epileptic seizure being an intervening act beyond the control of either claimant or respondent, it being the proximate cause.

*Merlo* vs. *Public Service Co.*, 381 Ill. 300.

BERGSTROM, J.

The claimant, John B. Tomasheski, filed his complaint April 28, 1947, alleging that he received certain serious and permanent injuries to his person due to the negligence of the respondent while he was an inmate at the Peoria State Hospital, Bartonville, Illinois.

He alleges that in June 1946, while an inmate in the State Institution, in Cottage 2-3, he went to the bathroom early one morning while no attendant was present, had an epileptic attack during which he grabbed an unprotected steam pipe, resulting in his sustaining serious burns. On July 23, 1947 complainant amended his complaint, changing Paragraph 6 to allege that his left hand was burned rather than his right hand, and substituting a new paragraph for Paragraph 11, which was made to allege that claimant had received surgical treatment at the Illinois Research Hospital at Chicago, and that because of the burns which he received it was necessary to amputate his right little finger.

The record in this case consists of the complaint with the amendments thereto, the answer of respondent, transcript of testimony on behalf of both claimant and respondent, waiver of brief and argument on behalf of claimant, statement, brief and argument of respondent, and reply argument on behalf of claimant.

The claimant contends that injuries he sustained are a result of negligent treatment of his burns by the doctors at the Peoria State Hospital and by the negligence of respondent in leaving the steam pipes uncovered.

With reference to his first contention, there is no evidence showing any negligence in the medical treatment of claimant. The evidence shows that the usual and recognized method of treatment for burns was given the claimant and that the results were satisfactory under the circumstances.

With reference to the second contention of claimant that the accident occurred through the negligence of respondent, the pertinent facts, as deduced from the evidence, are as follows: The Peoria State Hospital did not ordinarily hospitalize epileptics. Claimant was there as a voluntary patient. They did not refuse him admission, because the necessary treatment was available. He was in need of treatment, but his condition did not require personal supervision. He was physically able to help in the work at the cottage to which he was assigned. Dr. Trigger testified that the pipes in question were off in one corner. They are not covered and had been there in this condition for about forty years, and that an accident had never happened at this particular place before. He also testified on cross-examination, that at the State Hospital individuals had previously had epileptic attacks and got burned on radiators and pipes. From the claimant's testimony, it is apparent that he does not recall exactly what occurred, and Dr. Trigger testified that a person does not remember what takes place during an epileptic seizure, and also that it is characteristic of such patients, during a seizure, to try and grab hold of some object. We can conclude from all the evidence, however, that claimant suffered an epileptic seizure and, while in this condition, grabbed hold of the hot steam pipes in the corner of said bathroom, and burned his hands as alleged.

The controlling issue to be determined from the ret-

ord is whether the accident in question was one which an ordinary prudent person, under the circumstances, ought to have foreseen and could reasonably anticipate. The Attorney General, for respondent, argues that where a condition is negligently permitted to exist, but some intervening act causes an injury to occur in connection with such a condition, the intervening act and not the existing condition is the proximate cause of the injury He alleges that the hot steam pipes were an existing condition, and the epileptic seizure, an intervening act beyond the control of either the claimant or the respondent, mas the proximate cause. He cites the case of *Merlo* v. *Public Service Co.*, 381 Ill. 300, in which case electric wires, which were not protected by insulatioii, were held to be a dangerous condition, but the operation of a crane, which came in contact with the wires and resulted in the death of a workman, was held to be an intervening act which was the proximate cause of the death, and the company maintaining the electric wires was held not to be responsible for the death. He also cites the recent case of *Moudy* v. *New York Central Railroad Co.*, 385 Ill. 446, where the Supreme Court of Illinois, in determining the proximate cause of the accident, stated on pags 453, as follows:

*"The theory of the Appellate Court that he was an the exercise of due care because he had a raght to believe that his brakes would stop ham an proper tame at the speed he was going, and that their faalure to act, without negligence upon has part. renders the railroad company laable, is also untenable. We have frequently held that, an order for a plaintiff to recover, the defendant's negligence must have proximately caused, or contributed to cause, the injuries, rather than merely causing a condition providing an opportunity for other causal agencies to act. Merlo* v. *Public Service Co., 381 Ill. 300; Briske* v. *Village* of *Burnham, 379 Ill. 193; Illinois Central Razlroad Co.* v. *Oswald, 338 Ill. 270.) In the Merlo case we said: 'The test that should be applied an all cases an determining the question of proximate cause as whether the first wrongdoer might have reasonably anticipated the intervening cause as a natural and probable result of the first party's*

*own negligence,' It would be an extreme application of the law to require a railroad company operating its trains on fixed tracks, and required by the exigencies of commerce to move its passengers and commodities rapidly, to anticipate [ut every grade crossing) there might be defective brakes upon. every automobile approaching a crossing, which would relieve the driver of the exercise of due care, and make the railroad company laable, when not its negligence, but the traveler's lack of due care, caused the accident.*

*"The distinction between a crossing accident occurring from lack of due care upon the part of the plaintiff, or because of an intervening cause under its control, or at least not under the control of the defendant, is so slight as to make rules applicable to them practically the same. We are of the opnion that the evidence in this case most favorable to the plaintiff fails to show that he was in the exercise of due care, or that the alleged negligence of the dependant was the proximate cause of the accident. Under such circumstances, as a matter of law, the plaintiff is mot entitled to recover."*

Counsel for claimant, in his reply argument, calls attention to that part of the *Merlo case, supra,* where the court said: *"The test that should be applied in all cases, in determining the question of proximate cause, is whether the first wrongdoer might have reasonably anticipated the intervening cause, as a natural and probable result of the first party's own negligence."*

It is funclamental in tort law that to prove negligence there must be shown a duty to the person injured, a breach of the duty and an injury proximately resulting from such breach.

If we should conclude that the uncovered pipes creates a condition so that an ordinary prudent person could have reasonably anticipated the accident in question, we must necessarily resolve the issues in favor of claimant. However, the record would not sustain this view except by a very narrow application of this rule The evidence shows that these particular steam pipes were in their present condition for a period of approximately forty years, and that no one was previously injured because of their existence. There is no evidence, in the record that the danger of their exposed condition

mas ever brought to anyone's attention, as was done in the *Neering* v. *Illinois Central Railroad* Co. *case,* 383 Ill 366. where the dangerous condition present at the station was repeatedly called to the company's attention. The evidence also shows that the treatment of epileptic patients at this hospital was the exception and not the rule. It would be an extreme application of the law to require respondent to insulate all steam pipes in all public buildings, without regard to the persons who might come in contact with them. Considering the many years that these particular pipes had remained in their present condition without any resulting accident, it could not be reasonably concluded that they were a menace or hazard to the patients or workers at the Peoria State Hospital It is customary for persons having an epileptic seizure to fall wherever they might be at the time of an attack. This might have happened while the patient was in some other part of the hospital or grounds and under such circumstances that he could have injured himself by falling to the' floor, on a piece of furniture, or any hard or sharp object which might have come in contact with his person. This is one of the inherent dangers always present to those unfortunate. enough to be suffering from this disease. To say that respondent would have to protect a person having this disease from all possibilities would create a greater duty on the part of respondent than me feel is justified. It would, in fact, make it an insurer of all such patients.

Considering the accident from the evidence and all the circumstances surrounding it, we are of the opinion that the accident is one that could not reasonably have been anticipated. The presence of the uninsulated steam pipes was merely a condition similar to the unprotected wires in the *Merlo case, supra,* and the epileptic seizure

an intervening act beyond the control of either the claimant or the respondent. It was the proximate cause of the injury.

The evidence is not clear as to the damage which was sustained by claimant, if any. At the time he entered the hospital he was suffering from Dupuytren's contracture of both hands, and they were seriously crippled from this disease. Undoubtedly, the condition was aggravated by the burns, but there is some indication from the evidence that his hands and fingers are in better condition now than they were at the time he entered the hospital, with the exception of his amputated little finger, which was undoubtedly affected by his pue-existing disease. He also testified that he Iiad not worked for two or three months prior to entering the hospital. However, in view of our findings that respondent was not negligent, it is not necessary to further consider the question of damages.

For the reasons stated, an award is denied.

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(No. 4035—Claimant awarded $2,772.00.)

BETTY HEALY MASON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opanaon*** filed *March 16. 1948.*

BROWNING AND PARKIN, and J. ALBERT CAGNEY, of Counsel for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*temporary total disability. LOSS of use of right leg.* Where an employee of the Factory Inspection Division of the Department of Labor sustains injuries as a result of an accident within the meaning of the act, and all provisions have been complied with, upon proper showing claimant may be awarded temporary total disability and 50% permanent loss of use of right leg.

ECKERT, C. J.

On September 25, 1946, the claimant, Betty Healy Mason, while employed as a clerk-stenographer in the Chicago office of the Factory Inspection Division of the Department of Labor, slipped on the polished office floor and sustained a fractured neck of the right femur. She seeks compensation under the Workmen's Compensation Act for temporary total disability and for total and permanent loss of use of her right leg.

At the time of the accident the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. The accident arose out of and in the course of claimant's employment. All hospital, medical, and surgical care has been furnished by the respondent.

At the hearing before Commissioner Blumenthal, claimant testified that she was still suffering pain; that she still has difficulty in walking; that she can not walk without a cane; that she has difficulty getting up and down stairs; and that she tires very quickly. She stated that she was unable to carry on her regular office work; that she has tried to do typewriting at home, but that even when sitting the pain starts in her right hip and goes down the leg. Occasionally her right foot swells, and becomes stiff. She has not worked since the accident

Dr. Charles B. Puestow, testifying on behalf of the claimant, stated that he first examined her on the afternoon following the accident; that she then had a deformity of the right lower extremity with external rotation and inability to move the entire extremity, a rather typical picture of a fractured neck of a femur. X-rays

confirmed the diagnosis, and claimant was placed in traction for three days to overcome muscle spasm, at which time an operation was performed reducing the fracture and fixing it with a Smith-Peterson Nail. The claimant remained hospitalized until November 11, 1946, and remained continuously under the care of Dr. Puestow until November 12, 1947. Dr. Puestow stated that the union showed no permanent disability, but that claimant would have some limitation of motion resulting largely from disuse and from the scarring of soft tissue which occurs after such an injury and after a long disability.

The record also discloses a report from Dr. M. G. Luken, made at the request of the respondent. Dr. Luken reported that the flange inserted for the reduction showed no absorption; that movements of inversion, eversion, and flexion were excellent; that in about 85% of the cases the flanges remain permanent and cause no disturbance, but that in 15% of the cases absorption takes place, necessitating the removal of the flange Dr. Luken stated that in his opinion claimant was making a splendid recovery, but that she did have a permanent disability of approximately 50%.

From the testimony, and the reports in the record, and from the recommendation of the Commissioner who observed claimant at the hearing, the court finds that claimant was temporarily totally disabled from September 25, 1946 to November **12,** 1947, a period of 59 weeks. Claimant's salary for the year preceding the injury was $2,004.00, making her weekly compensation $38.53. Her compensation rate would therefore be the maximum of $15 00; since the injury occurred subsequent to July 1, 1945, this must be increased 20% making a compensation rate of $18.00 per week. Claiman't is thus entitled

to an award for temporary total disability of 59 weeks at $18.00 per week, or $1,062.00.

Claimant has also suffered a 50% permanent loss of use of her right leg, for which she is entitled to an award of 95 weeks at $18.00 per week, or $1,710.00. Claimant, however, was paid her regular wages of $38.53 per week from the date of the accident until May 31, 1947, or a total of $1,370.92, for non-productive time. This sum must be deducted from her award.

A. M. Rothbart & Associates were employed to take and transcribe the evidence at a hearing before Commissioner Blumenthal. Charges in the amount of $42.95 were incurred for these services, which charges are fair, reasonable, and customary.

An award is therefore entered in favor of A. M Rothbart & Associates in the amount of $42.95, which is payable forthwith; and an award is entered in favor of the claimant, Betty Healy Mason, in the total amount of $2,772.00, from which sum must be deducted the sum of $1,370.92 paid to her for non-productive time, leaving a balance of $1,401.08 payable to her in weekly installments of $18.00 per week, beginning March 19, 1948 for a period of 77 weeks, with an additional final payment of $15.08.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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**(No. 4037—Claim** dismissed.)

ELIZABETH SOPER, claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March;* ***16, 1948.***

WARNER AND WARNER, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

SALARY—*vacation period not availed of by employee considered waived.* Where the widow of an employee of the State seeks twelve days vacation pay which was due her deceased husband, said employee not having availed himself of same, and no showing that a request for a vacation having been made or such vacation denied him, claimant failed to state a legal cause of action against the State therefor.

*Tripp* vs. *Btate,* 10 **C.C.R. 137;**
*Lewis* vs. *State,* 10 **C.C.R. ,136.**

**A** vacation is a personal privilege that can be waived and claim **is** not compensable.

DAMRON, J.

This complaint alleges that the claimant, Elizabeth Soper, is the surviving widow of Elijah L. Soper, who departed this life July 11, 1947 leaving her as his sole and only heir at law of his personal property.

It further alleges that Elijah L. Soper was for several years prior to his death ,employed by the respondent as a plumber at the Dixon State Hospital and that on November *3,* 1946 he completed a full year of employment at said Dixon State Hospital and by the rules of employment then in force he thereby became entitled to twelve (12) days vacation with pay, but no part of said vacation was ever taken by him so that at the time of his death he was still entitled to twelve (12) days of vacation.

The complaint further alleges that at the time of his death the hourly rate of pay which was then being paid to him was $1.95.

Claimant alleges that she is entitled to receive from the respondent an amount equal to twelve (12) days pay at the rate which was being paid to him at the time of his death amounting to the sum of $187.20.

**A** motion to dismiss the complaint has been filed by the Attorney General for the reason that the claim is not compensable under the laws of the State of Illinois.

This court has passed on claims similar to the one at bar.

In *Tripp* vs. *State,* 10 C.C.R. 137, the claimant was formerly an assistant Quartermaster General in the Military and Naval Department of the State of Illinois. He made a claim for $208.00 representing one-half month's salary claimed to be due him for a period of two weeks for a vacation during the years **1932-1933,** for which he claimed he was entitled. In his claim he alleged that he did not receive a vacation during said period due to the fact that his work at the time was such that his absence from the office was not practicable; that having been entitled to an additional two weeks pay for this vacation period, he was entitled to an award.

The Attorney General filed a motion to dismiss the claim for the reason it failed to state a legal cause of action against the State.

In denying the claim, this court cited *Crooker* vs. *Sturgis,* 175 N. Y. 158. This case was based upon a demand for additional pay because **of a** vacation period which had not been availed of by the plaintiff, the court held, "a vacation is a personal privilege that can be waived." In this case, as in the *Crooker case supra,* there is no showing that a request for a vacation was ever made by Mr. Soper or such vacation denied to him.

At the same term of this court another claim was denied to Myrtle Lewis, claimant *(Lewis* vs. *State,* 10 C.C.R. **136.)** This was **a** claim for additional pay during vacation period not availed of. The court in denying the Lewis claim cited the case of *Tripp* vs. *State, supra,* and held it was controlling in the Lewis claim.

The complaint in this case shows that Mr. Soper completed a full year of employment for the State and it is presumed that he was paid his salary from month

to month as issued to him by monthly warrants by the State of Illinois, and which on the face covered the period of service for which salary was thereby paid.

Since the deceased accepted the amounts due him for services rendered during stated periods, his widow cannot claim an award from the State for an additional amount for those periods.

There being no basis for an award, the motion of the Attorney General to dismiss this claim must be sustained and the claim dismissed.

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**(No.** 4039—Claimant awarded **$2,334.86.)**

EFFIE MAY BURTON, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

***Opinion filed March 16, 1948.***

ROY A. PTACIN, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

**WORKMEN'S** *COMPENSATION* **ACT**—*temporary* **total** *disability*—*permanent* **partial loss** *of use of left* **leg.** Where claimant was employed in the Department of Public Welfare at the Chicago State Hospital and while working in the officers' kitchen, slipped on the floor and sustained accidental injuries arising out of and in the course of her employment, resulting in temporary total disability and partial loss of use of her left leg, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof, and proper proof of claim **for** same.

DAMRON, **J.**

On September 18, 1947, claimant, Effie May Burton, filed her complaint for an award aggregating $4,627.70 under the provisions of the Workmen's Compensation Act because of injuries alleged to have been sustained in an accident arising out of and in the course of her employment by respondent.

The transcript of the evidence was filed January **14,** 1948.

On May 10, 1947 claimant classified as Cook I was employed in the Department of Public Welfare at the Chicago State Hospital. Her gross earnings for the preceding year totaled $1,980.00 and for May and June, 1947, $165.00 and $132.00, respectively.

Mrs. Burton testified that on May 10, 1947, she was working in the officers' kitchen of the hospital. While carrying a receptacle of grease, she slipped on grease previously spilled on the floor. She ,could not get up because of the severe pain and was assisted to her feet by two patients. She lived in the employees' dormitory on the premises and was taken to the room she occupied with her husband who was also employed at the hospital.

Her husband called Dr. Hurwitz, a physician not connected with the hospital. He visited claimant four times. Treatment was confined to the application of cold packs and later heat. She did not see any other physician until June 7th when she was examined and X-rayed by Dr. Benjamin Cohen, one of the hospital staff physicians. Later she was examined by Dr. J. M. Gillespie and Dr. W. W. Ritchey in Marion, Illinois, and Dr. Albert C. Field in Chicago.

Upon reaching her room immediately after the accident she was placed in bed. She experienced pain in her knee, it was swollen and was still swollen a month later when she saw Dr. Gillespie.

Dr. Campbell, the Assistant Superintendent enforcing a rule at the institution requiring non-working personnel to relinquish their room, requested claimant to leave, and a few days later on June 7, 1947 she moved to Marion, Illinois, returning to Chicago in November.

Before the accident she could **walk** normally but since then she has been unable to walk, her knee still

pains her and is stiff and swollen. She has not been gainfully employed since the accident.

Claimant further stated that she never personally requested any medical or hospital treatment from the officials at the Chicago State Hospital. Dr. Hurwitz had previously attended her husband and as far as she knew was voluntarily called by the latter to furnish her medical attention.

C. M. Weesner, the chief dietician and claimant's immediate superior, testified that Mr. Burton called him and told him about the accident the following day, but he had known about it before, having scheduled someone else to replace Mrs. Burton.

Dr. Albert C. Field, called as an expert witness, examined claimant three or four times and took x-rays. On October 25, 1947 he found her left knee enlarged; held in flexible limitation of extension about 45 degrees from normal with flekion limited to 90 degrees or about half of normal. Each side of patella as well as the capsule were thickened; there mas excess fluid in the joint; the knee mas discolored; swollen and pitted on pressure indicating impaired circulation.

When he examined her again on January 6, 1948 she showed slight improvement in that she lacked only 25 degrees extension; there was no pit on pressure and no excess fluid in the joint. He interpreted the x-rays as showing an inflammatory condition in the articulating surface of the patella; and an injury to the external condyle of the femur and upper border plateau of the tibia; a displacement of the lateral condyle of the tibia as the result of an impacted fracture. In his opinion owing to the synovitis due to the trauma at the time of the accident and that now caused by walking; the loss of weight—bearing surface; instability caused by the de-

pressed or one-sided condition of the fracture; the circulatory disturbance and limitation of extension and flexion, she has about 35% normal function of the leg but should show a little improvement with an ultimate permanent impairment of 50%.

The record supports a finding that the parties were operating under the provisions of the Workmen's Compensation Act; that the accident arose out of and in the course of claimant's employment and that notice of the accident and claim for compensation were made within the required statutory time.

Claimant obtained her own medical attention and makes no claim for the same.

The evidence discloses that claimant sustained temporary total disability for 34 5/7 weeks from May 10, 1947 to January 8, 1948 and a permanent partial loss of use of her left leg. The medical testimony on behalf of claimant that she will ultimately recover not more than 50% normal use of the leg is based upon definite findings. This testimony is not impeached and stands without contradiction.

Commissioner Blumenthal before whom the testimony was taken and who observed the claimant agrees with the findings of the medical testimony and recommends an award as above set forth. We find that claimant is entitled to an award in the sum of $2,334.86 from which must be deducted the sum of $271.30 representing payments by respondent to her for unproductive time during May and June 1947.

On the basis of this record an award is hereby entered in favor of claimant, Effie May Burton. in tlie sum of $2,334.86. This sum represents 34 5/7 weeks for temporary total compensation and 50% partial permanent

loss of use of her left leg. This award is payable to her as follows:

The sum of $792.00 has accrued to her since the injury. Since claimant was paid $271.30 for non-productive time, this sum must be deducted leaving an accrued sum of $520.70 which is payable forthwith. The remainder of said award amounting to the sum of $1,542.86 is payable in meekly installments of $18.00 per week beginning March 14, 1948, for 85 weeks with one final payment of $12.86, as provided under the provisions of Section 8(e) of the Workmen's Compensation Act, as amended.

**A.** M. Rothbart, court reporting service, was employed to take and transcribe the testimony for which they made a charge of $68.70. We find that this charge is fair, reasonable, and customary.

An award is therefore entered in favor of **A.** M. Rothbart, Chicago, Illinois in the sum of $68.70.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4045—Claimant awarded $4,800.00)

LUCILLE HAYWARD, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

***Opinion filed March 16, 1948.***

OLIVER A. **CLARK,** for Claimant.

GEORGE F. **BARRETT,** Attorney General, for Respondent.

**WORKMEN'S COMPENSATION ACT**—*award under Section 7, Par.* "A" of *Act.* Where an employee of the Department of Public Works and Buildings, Division of Highways, received accidental injuries arising out of and in the course of employment resulting in his death, an award for compensation therefor may be made to those legally entitled thereto, in acoordance with the provisions of the Act, upon compliance with the requirements thereof and proper proof of claim therefor.

ECKERT, C. J.

The claimant, Lucille Hayward, is the widow of Henry Hayward, deceased, a former highway maintenance worker employed by the respondent in the Department of Public Works and Buildings, Division of Highways. On June 24, 1947, while helping to load a kettle of hot tar onto a truck, at the intersection of Sacramento Boulevard and Taylor Street, in Chicago, the kettle tipped over, throwing the decdent to the pavement. The molten bituminous material in the kettle ran over the pavement where decedent lay, coating his back and portions of his legs, arms, and head. He was immediately taken to Mount Sinai Hospital in Chicago and placed in charge of Dr. Joseph T. Gault, who reported to the respondent on July 18, 1947 that the decedent had suffered second and third degree burns. Dr. Gault also stated that tlie areas had become infected, and that treatment consisted of dressings, penicillin, plasma blood transfusions, vitamins, and a high protein diet.

Since the burns did not readily respond to treatment, the decedent mas transferred on August 2, 1947 to St. Luke's Hospital, Chicago, and placed in care of Dr H. B. Thomas, Professor Emeritus of Orthopedics, University of Illinois Medical College. Dr. Thomas reported an extensire infection of the burned areas, and decedent's condition became rapidly worse. He died on August 18, 1947. Claimant, as widow of the deceased employee, now seeks an award under the provisions of the Workmen's Compensation Act.

**At** the time of the accident which resulted in the death of Henry Hayward, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this. State and notice of the accident and claim for compensation were made within the

time provided by the act. The accident arose out of and in the course of decedent's employment.

During the year immediately preceding the accident which caused the death of Henry Hayward, his earnings totalled $2,060.00, so that his average weekly wage was $39.62, and his compensation rate was the maximum of $15.00 per week. Since the injury occurred subsequent to July 1, 1945, this must be increased 20%, making a compensation rate of $18.00 per week. The decedent had no children under sixteen years of age dependent upon him for support at the time of his death.

Claimant, is entitled to an award under Section i a of the Workmen's Compensation Act in the amount of $4,000.00. The death having occurred as a result of an injury sustained after July 1, 1945, this amount must he increased 20%, or $800.00. The decedent, however, was paid for the period from June 25, 1947 to August 18, 1947, for non-productive time, the total .amount of $260.29, which must be deducted from any award made in this case.

An award is therefore made in favor of the claimant, Lucille Hayward, in the amount of $4,800.00, less the sum of $260.29 paid to the decedent for non-productive time, or the sum of $4,539.71 to be paid to her as folloms:

$ 297.71, which has accrued, is payable forthwith:
$4,242 00, is payable in weekly installments of $18.00 per week beginning March 23, 1948 for a period of 235 weeks with an additional final payment of $12.00.

All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as map from time to time be necessary.

This award is subject to the approral of the Governor as provided in Sectioii 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4046—Claimant awarded $5,200.00.)

LOUISE J. SIPPEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed March 16, 1948.*

CLAIMANT, *Pro Se.*

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for* death *of* employee *under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, resulting in his death, an award may be made for compensation therefor to those legally entitled thereto, in accordance with the provisions of the Workmen's Compensation Act, upon compliance with the requirements thereof and proper proof of claim for same.

DAMRON, J.

The record consists of the complaint, report of Division of Highways, stipulation in lieu of evidence, waivers of briefs of claimant and respondent.

The stipulation shows that on the 18th day of July, 1947, John Sippel, an employee in the Division of Highways sustained an accidental injury which arose out of and in the course of his employment; that notice of the said injury was given to the respondent and claim for compensation on account thereof was made within the time required under Section 24 of the Workmen's Compensation-Act, as amended, and the complaint was filed within apt time under the Statute.

It is further stipulated that the said John Sippel was employed as a common laborer and that at periods his team and mower were also hired to mow vegetation along

State highways, and on these occasions he was paid an additional amount for the use of his team and mower.

The Departmental report shows that Mr. Sippel was first employed by the Division of Highways in June 1942 as a common laborer at a wage rate of $ .50 per hour. He mas intermittently employed by the Division from that date until July 18, 1947. During the Spring of 1947 he agreed to mow vegetation with his team and mower for the Division and for these services beginning June 16,1947 he was to receive $1.60 an hour. He began mowing vegetation on that date and worked regularly until July 18, 1947 when he received the injuries which subsequently resulted in his death. The Departmental report further shows that common laborers such as was Mr Sippel received $ .90 an hour during the period just prior to and on the date of his injury, eight hours coiistituted a normal working day. They worked less than 200 days a year.

On July 18, 1947 he had been assigned to mow weeds on 127th Street in Cook County, east of the village of Palos Park, and at about 3:30 o'clock that afternoon he was found unconscious in the north ditch of 127th Street about two blocks west of Harlem Avenue.

The Cook County Highway Police were notified, who secured an ambulance which took him to Mary Hospital in Evergreen Park where Dr. Edward M. Murphy was placed in charge of the case. €€ereported to the Division that Mr. Sippel fell off the mower holding to the lines; the horses backed up causing the wheels of the mower to pass over his body. Dr. Murphy diagnosed his injuries as contusion of the abdominal wall, ruptured liver, and retroperitoneal hematoma. He was placed in bed, blood transfusions mere given together with penicillin. X-rays were made.

Dr. Murphy secured the services of Dr. R. H. Lamler as a consultant who assisted in the treatment of the patient. On August 1, 1947 he was released from the hospital to convalesce at home. On September 3, 1947 the Division had him removed by ambulance to St. Luke's Hospital in Chicago where he was treated by Dr. H. B. Thomas, Orthopedic surgeon. He did not respond to treatment under Dr. Thomas and on September 18, 1947 he died as a result of this injury.

From this record we made the following findings: that on the 18th day of July 1947, the decedent John Sippel received injuries which arose out of and in the course of his employment for the respondent which resulted in his death on the 18th day of September 1947; that his annual wages for one year next preceding his injury amounted to the sum of $1,440.00. At the time of his death he was 67 years of age and left surviving him his widow, the claimant, Louise J. Sippel. There were no children under 16 years of age dependent upon him for support. We find that his average weekly wages based on the fact that he was a part time employee amounted to $27.69, therefore his weekly compensation rate is $18.00 since the injury and death occurred subsequent to July 1, 1947.

An award is therefore entered in favor of the claimant, Louise J. Sippel, in the sum of Five Thousand Two Hundred ($5,200.00) Dollars, as provided under Section 7 (a) of the Workmen's Compensation Act, as amended.

From the date of the death of Mr. Sippel to the 11th day of March, 1948 the sum of $450.00 has accrued representing 25 weeks, which is payable to her in a lump sum. The remainder of said award, amounting to Four Thousand Seven Hundred and Fifty ($4,750.00) Dollars, is payable to her at $18.00 per week for 263 weeks with

one final payment of $16.00, payable out of the Road Fund.

The record shows that the Division- of Highways formarded to claimant check No. 133260, for $113.14 and check No. 137166, for $43.71 payable to decedent for total temporary disability which were received by claimant after Mr. Sippel's death. It further shows that these checks were returned to the Division of Highways by the claimant but were thereafter returned to her with instructions to cash them. This award does not take into consideration the amounts paid to her 'through these checks and they must be returned to the Division of Highways by her for ,cancellation otherwise the amount of $156.85 must be deducted from the award.

The future payments before referred to, being subject to the terms and provisions of the Workmen's Compensation Act, jurisdiction of this cause is hereby retained by this Court for the purpose of making such further orders as may from time to time be necessary herein.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4051—Claimant awarded **$390.00.)**

LARUE **LANE,** Claimant, *vs.* **STATE OF** ILLINOIS, Respondent.

***Opinion filed March 16, 1948.***

CLAIMANT, *Pro Se.*

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

**WORKMEN'S COMPENSATION ACT**—*right index finger.* Where employee of State sustains accidental injuries arising out of, and in the course **of *his*** employment, while engaged in extra-hazardous enterprise, resulting in temporary partial loss **of** use of right index finger, an

award may be made for compensation, therefor, in accordance with the Provisions under Section 8, Paragraph "E" of the Act, upon compliance by the employee with the terms thereof and proper proof of claim for, same.

BERGSTROM, J.

Claimant filed his claim on December 2, 1947 for compensation under the Workmen's Compensation Act, for injuries which he suffered on September 19, 1947, while employed by respondent.

He was employed by respondent in the Department of Public Works and Buildings, Division of Highways, as a highway patrolman. On September 19, 1947 claimant's group of men were cleaning a sewer on S.B.I. Route No. 97, near Dearborn and Promade Streets, in Havana, Mason County, Illinois. This was done by feeding a cable through the tile from one manhole to another. A drag was attached to one end of the line and a winch was used to pull the drag through that portion of the sewer. On the aforesaid date, while operating the winch, claimant placed his right hand on an exposed cogwheel of the winch. His right index finger was caught in the cogs and crushed. Claimant went to the office of Dr. William E. Northland in Havana, who gave first aid immediately after the accident. On the following day Dr Northland sent claimant to the Deal Clinic at Springfield, Illinois, for subsequent care.

It was necessary to amputate his right index finger at the distal joint. The X-rays show no injury to the remainder of the finger. Except for sufficient time to call on his doctor, claimant continued work throughout his treatment period. Respondent paid the medical expenses incurred in connection with this injury.

At the time of the accident in which the claimant, Larue Lane, mas injured, employer and employee were operating under the provisions of the Workmen's Com-

pensation Act of this State. Notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of claimant's employment.

Claimant had no children under sixteen years of age depending upon him for support. For the year preceding his injury his earnings totaled $2,258.03. His compensation rate, therefore, would be $15.00 per week. However, as the injury was incurred after July 1, 1947, this must be increased 30%, making his compensation rate $19.50 per week.

Claimant is entitled to an award for one-half the loss of his right index finger. Under Sec. 8, Par. E, this would be twenty weeks at $19.50 per week, or $390.00. An award is therefore made in favor of claimant, Larue Lane, in the amount of $390.00, all of which has accrued and is payable forthwith.

Hugo Antonacci, court reporter, 502 Illinois National Bank Building, Springfield, Illinois, was employed to take and transcribe the testimony, for which he made a charge of $5.55. We find that this charge is fair, reasonable and customary.

An award is therefore entered in favor of Hugo Antonacci, Springfield, Illinois, in the sum of $5.55.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. **4026—Claimant** awarded **$649.98.**)

MALCOLM MACLEOD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion filed April 20, 1948.***

**EARL** LITTLE, for Claimant.

GEORGE F. BARRETT, Attorney General; **WILLIAM** L. **MORGAN,** Assistant Attorney General, **for** Respondent.

WORKMEN'S COMPENSATION ACT—*recovery for aggravation of pre-existing disease burden of proof upon claimant—temporary total disability.* Where an employee of the State while working as a janitor in the State Northwest Armory in Chicago, fell over the balustrade from the second floor for about a distance of 16 feet and the evidence showed he was suffering from a pre-existing disease; the burden of proof is upon claimant to establish by a preponderance of the evidence his right to compensation and no award can be based upon speculation, surmise or conjecture. To recover compensation for an aggravated or accelerated preexisting disease, claimant must establish his claim by proper proof of same.

**DAMRON, J.**

The complaint in this case was filed on May 23, 1947. It is a claim under the Workmen's Compensation Act, and alleges that the above named claimant was injured on February 22, 1947 while employed by the respondent as a janitor in the State Northwest Armory in Chicago. It seeks an award for permanent total disability.

The evidence was taken on the 14th day of November; 1947 before Commissioner Blumenthal.

Claimant testified that on February 24, 1947 he was ordered by one Joseph Salemme, a fellow employee, to move some chairs, arid while going down an inner stairway from the second floor of the Armory he fell over the balustrade for a distance of about 16 feet' striking his head against the cement floor. He testified he lost consciousness for a short time, and .then was taken by an ambulance to Alexian Brothers' Hospital.. The Departmental reports filed in this cause show that he was discharged from the hospital on March 26, 1947. On the date of the hearing he testified that he did not feel well; his head ached; his back was painful; he could not stand up; and that he was dizzy all the time, and if he walks a short distance he falls down.

On cross-examination he testified that the accident occurred about 1:15 P. M., and that the balustrade over

which he fell was about 4 feet high. No one witnessed his fall. He further testified that after leaving the hospital he went to his room and could not walk down the stairs for about 2 months. He mas unable to leave his room alone until some time in June and rested thereafter to September. Previous to his employment by the respondent, he testified that he had worked four years at the Bible Institute in Chicago, but had quit there about one month prior to going to work at the Armory, because the work was too hard for him.

In support of his complaint Doctor Albert C. Field was called and testified that he examined the claimant on October 9, 1947 finding claimant to be unsteady on bending test with a tremor of the extended fingers and tongue; restricted movement of the spine; roughened breathing sounds; a somewhat rapid heart; a blood pressure of 180/90; urine specific gravity sp. 1018; with a trace of sugar; reflexes present, equal and somewhat exaggerated; marked nervous instability; and arteriosclerosis of the heart, Dr. Field testified that he took X-rays of the claimant which revealed a healed fracture of the 9th rib. He expressed an opinion that was based on his examination that claimant was unable to perform duties such as sweeping, dusting and arranging chairs; that his disability was permanent and that the fall, testified to by claimant, probably had a tendency to aggravate his existing condition. That in his opinion the arteriosclerosis was probably due to his age but there could be a causal connection between the concussion and the claimant's tremors, diabetic condition, arteriosclerosis and positive findings of the Lasuege and Kernig tests.

The respondent called Louis J. Schutt, custodian of the Armory, who testified he had found the claimant lying at the bottom of the stairs alongside of two push-

brooms. He further testified that the stairway in question is entirely enclosed with a handrail on both sides; that the flight comprised about 16 steps, and that it was riot possible for claimant to have fallen over the balustrade. He further testified that as far as he knew claimant had no reason to be going down the stairs, and further that Joseph Salemme, who claimant had testified had ordered him to move some chairs, was not arranging any chairs, nor was any furniture moved that day in the Armory. Salemme was not called as a witness by the respondent.

It was stipulated by and between the parties that if Dr. William E. Dyko were called as a witness in this case and were sworn, he would testify that he was the treating and attending physician and surgeon of the claimant, and that he would testify as follows:

"That claimant was discharged as a patient on March 26, 1947; that he had recovered from the injuries sustained on February 24, 1947, consisting of contusions and abrasions to his head, arms, elbows, wrists, back, cerebral concussion, fracture of the 9th rib, and partial collapse of the base of the left lung. These injuries were complicated by arteriosclerotic heart disease, with first degree arterio-ventricular block and decompensation, diabetes, and hypertension having been brought under control. While these conditions were aggravated by the accident they were neither caused by nor did they result therefrom."

The Supreme Court of this State and this Court has held on numerous occasions that when a person has a pre-existing disease and that disease is aggravated or accelerated in the course of the employment by accidental means it is compensable. *Finkler* vs. *State*, 11 C.C.R., 55; *Cameron, Joyce & Co.* vs. *Ind. Com.*, 324 Ill. 447; *Marsh* vs. *Ind. Com.*, 386 Ill. 11; C. & A. Ry. Co. vs. *Ind. Com.*, 310 Ill. 506; *Muir* vs. *State*, 14 C.C.R., 191. However, in order to recover an award it has been held by this Court that the burden is upon claimant to establish by a preponderance of the evidence his right to compen-

sation, and no award can be based upon speculation, surmise or conjecture. *Sprague* vs. *State*, 14 C.C.R., 116; and cases cited thereunder.

Viewing the record as liberally as possible so as to accord the claimant every benefit of the Workmen's Compensation Act, as amended, we are unable to conclude that claimant has proven that the accident sustained by him on the 24th day of February, 1947 aggravated or accelerated his previous unstable condition of health. His claim for permanent total disability must be denied.

We find from the evidence, however, that claimant was temporarily, totally disabled from the date of his injury, to-wit February **24,** 1947, to the 14th day of November, 1947, representing 37 4/7 weeks, and based on his weekly compensation rate of $17.30 this would amount to the sum of $649.98.

An award is therefore hereby entered in favor of claimant, Malcolm MacLeod, in the sum of $649.98 for temporary total disability for the period above indicated, from which must be deducted the sum of $145.60 paid to him for the last five days of February and all of March, 1947 for unproductive time, leaving a net award in the sum of $504.38, which has accrued and is payable forthwith.

The record discloses that A. M. Rothbart, Court Reporting Service, has filed a bill amounting to the sum of $50.15 for the taking and transcribing of the evidence. We find this charge is fair and reasonable, and it is hereby allowed.

An award is hereby entered in favor of A. M. Rothbart in the sum of $50.15.

These awards are subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation **awards** to State employees."

(No. 4032—Claimant awarded $540.00.)

FORREST G. LA'MB, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1948.*

H. OGDEN BRAINARD, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*loss of use of finger under Section 8, Paragraph. "E" 3 and 4.* Where an employee of the Department of Public Works and Buildings, Division of Highways, sustains an accidental injury arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award may be made for compensation therefor in accordance with the provisions of the Act, upon compliance with the requirements thereof and proper proof of the same.

BERGSTROM, J.

Claimant, Forrest G. Lamb, filed his complaint on July 3, 1947 for compensation under the Workmen's Compensation Act for injuries he sustained on October 4, 1946 while in the employ of respondent.

He was employed by the Department of Public Works and Buildings, Division of Highways, as an equipment operator. On October 4, 1946 he was removing temporary barricades placed to protect pavement patches on U. S. Route 45 north of Mattoon in Coles County. About 1:15 P. M. aiid approximately two miles north of Mattoon on this date a barricade frame which was thrown into the truck fell on claimant's right middle and ring finger crushing them between other material in the truck and causing compound comminuted fractures of both terminal phalanges. The Division of Highways took Mr. Lamb to Dr. F. B. Lloyd of Charleston, who treated the injuries. Due to necrosis, it was necessary, on December 19, 1946, to amputate the terminal phalanx of the right third or ring finger. Claimant lost three days from his employment, for which he was paid full salary in the

amount of $16.45. His medical bills, amounting to $115.00, were paid by respondent.

The employee and employer were operating under the provisions of the Workmen's Compensation Act, and we find that claimant was injured out of and during the course of his employment. We also find that respondent had immediate notice of the accident and that claim was filed in apt time to meet the jurisdictional requirements of Sec. 24 of the Act.

The evidence shows that claimant's right ring or third finger was amputated at the proximal end of the terminal phalanx, and the right middle or second finger was left stiff in the first joint and crooked from the first joint to the tip, and that there was permanent injury to the nail. Both fingers also show a drawing by the flexor tendons.. Counsel for claimant contends because of this and the fact that three cysts have formed on the ligaments in the palm of the right hand, claimant should be awarded compensation for the permanent and complete loss of the use of both fingers, or, in the alternative, an award for the partial loss of use of the right hand. Dr. Lloyd testified that, in his opinion, there would be 60 to 75 per cent loss of function of the two fingers in question. Subparagraphs 3 and 4 of paragraph (e) of Sec. 8 of the Workmen's Compensation Act state — For *the loss of a finger or the permanent and complete loss of its use* * * * Sub-paragraph 6 reads *"The loss of the first or distal phalanx of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger."* Commissioner Jenkins, who heard the testimony and personally viewed the injured fingers, recommended an award based upon 50 per cent loss of both the second and third fingers. From the evidence, and the plain wording of the applicable

provisions of the Act, the Court concurs in his finding.

Claimant was absent only three days from his employment, so he is not entitled to any compensation for temporary incapacity; accordingly, the sum of $16.45 paid to him for unproductive time must be deducted from the award. . He had no children under 16 years of age. His earnings for the year preceding his injury totaled $2,040.00. The compensation rate would, therefore, be $15.00 per week, which must be increased 20% or to $18.00 per week, the accident having occurred after July 1, 1945. He is, therefore, entitled to an award under Sec. 8 (e) 3 for 17½ weeks at $18.00 per week or $315.00 based on 50% loss of use of his second finger, and to an award under Sec. (e) 4 for 12½ weeks at $18.00 per week or $225.00 based on 50% loss of use of his third finger, or a total award of $540.00, from which must be deducted the sum of $16.45 paid claimant for unproductive time.

An award is therefore made to claimant, Forrest G. Lamb, in the sum of $523.55, all of which has accrued and is payable forthwith.

Helen Bell, Court Reporter, charged $13.50 for taking and transcribing the testimony. We find the amount charged is fair, reasonable and customary, and should be allowed.

An award is therefore made to Helen Bell, Box 188, Charleston, Illinois, in the sum of $13.50.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 4048—Claimant awarded $877.50.)

GROVER C. BOSTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1948.*

TOLLIVER AND BAYLER, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*partial loss of use of third and fourth fingers of left hand.* Where an employee of the State receives accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in permanent partial loss of use of the third and fourth fingers of his left hand, an award may be made for compensation therefor in accordance with the provisions of the Act upon compliance by the employee with the terms thereof and proper proof of claim for same.

ECKERT, C. J.

On August 18, 1947, claimant, Grover C. Boston, an employee of the respondent in the Department of Public Works and Buildings? Division of Highways, while making adjustments to a mixer of bituminous materials at the Division's storage yard near the village of Flora, Illinois, caught the fingers of his left hand between the mixer blades and the inside of the metal mixer drum. Claimant's left middle, ring, and little fingers were severely lacerated and mangled.

Claimant was immediately taken to the office of Dr. Howard Tillman and Dr. H. D. Fehrenbacher, at Flora, where he received first aid. He was then taken to the Olney Sanitarium, where Dr. Frank Weber amputated the left ring finger and gave surgical attention to the other fingers. Claimant returned to work on August 23, 1947, but continued under the care of Dr. Weber, who reported to the Division on November 2nd that claimant's permanent disability was the loss of his third finger and the complete loss of use of his fourth or little finger.

At the time of the accident, the claimant and re-

spondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment. The claimant had no children under sixteen years of age dependent upon him for support at the time of his injury.

Claimant has sustained the loss of the third finger of his left hand and the permanent and complete loss of use of the fourth finger of his left hand. For the loss of a third finger claimant is entitled to fifty per cent of his average weekly wage for twenty-five weeks, and for the permanent and complete loss of use of his fourth finger, claimant is entitled to fifty per cent of his average weekly wage for twenty weeks. Claimant's annual earnings in the year preceding his injury were **$1,823.71.** His average weekly wage was **$35.07,** one-half of which is **$17.54.** Claimant's compensation rate is thus the maximum of $15.00 per week. The injury having occurred subsequent to July 1, **1947** this must be increased **30%** or $4.50, making a compensation rate of **$19.50** per week.

**An** award is therefore entered in favor of the claimant, Grover C. Boston, in the total sum of **$877.50** to be paid as follows :

**$682.50, accrued, is payable forthwith;**
**$195.00, payable in weekly installments of $19.50 per week beginning April 20, 1948 for a period of 10 weeks.**

This award is subject to the approval of the Governor, as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4049—Claimant awarded $1,519.50.)

ROBERT B. ZIMMERMAN, IN HIS INDIVIDUAL CAPACITY AND AS *NEXT* FRIEND AND NATURAL GUARDIAN ROBERT B. ZIMMERMAN, JR., Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opanion filed* ***April*** *20. 1948.*

CHARLES M. KENNEY, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

*WORKMEN'S* COMPENSATION ACT—*partial dependency under Sectaon 7, Paragraph "C."* The decisive test is whether the contributions were relied upon by applicant for his means of living judging by his position in life and whether he was to a substantial degree supported by the employee at the time of the latter's death; *Weil-Malter Manufacturing Company* vs. *Ind. Com.*, **376** Ill. 48. Claimant being the son of an employee of the State who received accidental injuries resulting in death, arising out of and in the course of his employment while engaged in extra-hazardous employment, and who claims to be a dependent **of** such employee, under said section, it must be shown that at the time of said death he relied upon him for his means of livelihood in a substantial degree and may be compensated upon proper proof and oompliance with all provisions of the Act.

SAME—*medical expense.* Where the father **of** the son of an employee of the State who received accidental injuries **as** contemplated by the Act advanced medical expenses upon the assurance of the supervisor in charge of the Division of Child Welfare, "he would be reimbursed," upon proper proof of the same, is entitled to an award for said medical expenses advanced.

BERGSTROM, J.

On November 21, 1947, Robert B. Zimmerman, in his individual capacity and as next friend and natural guardian of Robert B. Zimmerman, Jr., filed his complaint for compensation under the Workmen's Compensation Act because of the death of Mary Faye Zimmerman, the wife of claimant and the mother of Robert B. Zimmerman, Jr.

The decedent, Mary Faye Zimmerman, was employed by respondent on June **23,** 1947 in the Department of Public Welfare, Child Welfare Division. On October 20, 1947, while returning by automobile from

an assignment in Taylorville and Pana to Springfield, her automobile accidentally collided with another automobile at approximately ten miles south of Springfield on U. S. Route 66. She was badly injured and immediately taken by ambulance to St. John's Hospital, Springfield, Illinois, where, as a result of her injuries, she died on October 22, 1947.

At the time of the accident the claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for Compensation were made within the time provided by the Act. We find that the accident arose out of and in the course of the employment.

There remains, however, the question to be determined as to whether Robert B. Zimmerman, Jr., the son, was partially dependent upon the earnings of his mother, Mary Faye Zimmerman, at the time of the latter's fatal injury, within the contemplation of paragraph (c) of Sec. 7 of the Workmen's Compensation Act. This paragraph provides :

"If no amount is payable under paragraph (a) or (b) of this Section, and the employee leaves **any** parent ***or*** parents, child or children, who, at the time of the accident, were partially dependent upon the earnings of the employee, then such proportion of a sum equal to four times the average annual earnings **of** the employee as such dependency bears to total dependency, but not less in any event than one thousand dollars, and not more in any event than three thousand seven hundred fifty dollars."

Whether there is a dependency under paragraph (c) of the Act is a question of fact to be established by the claimant. *Wedron Silica* Co. v. *Industrial Commission,* 312 Ill. 118; *Peterson* v. *Industrial Commission,* 315 Ill. 199. The pertinent facts on the question of dependency, based on the evidence, are: that the deceased was employed by respondent from June 23, 1947 to the date of her death, earning $180.00 per month; the father, Rob-,

ert B. Zimmerman's annual earnings, commencing in September 1947, were $5,800.00; the son earned $502.00 the preceding year, most of it earned as a lifeguard during the summer months; that the son, at the time of his mother's death, was attending Junior College in Springfield; his tuition and expenses at school were paid by his parents; he lived in the home of his parents, and the cost of his food, lodging and clothing were paid for by his parents. The father testified that the home was owned jointly by deceased wife' and himself, and that their earnings were deposited in a joint bank account, against which they would both draw checks for family expenses. He further testified he was unable to figure what expenses were paid out of his wife's earnings and what were paid out of his earnings, as they were all lumped together and came out of common funds.

The law applicable to the question of dependency is well summarized in the case of *Air Castle, Inc.*, vs. *Industrial Commission*, 394 Ill. 62, where our Supreme Court said, on page 66:

*"Principles applicable to the factual situation presented are firmly established. Dependency, as the term is employed in the Workmen's Compensation Act, implies a present existing relation between two persons, where one is sustained by the other, or looks to or relies on the aid of the other for support or for reasonable necessities consistent with the dependent's position in life. (Weil-Kalter Mfg. Co. v. Industrial Corn., 376 Ill. 48; France Stone Co. v. Industrial Com., 369 Ill. 238; Bauer & Black v. Industrial Com., 322 Ill. 165.) The decisive test, it is settled, is whether the contributions were relied upon by the applicant for his means of living, judging by his position in life, and whether he* was *to a substantial degree supported by the employee at the time of the latter's death. (Weil-Kalter Mfg. Co. v. Industrial Corn., 376 Ill. 48.) The statute awards compensation where there is actual dependency at the time of the injury although such dependency might afterwards cease or even probably would cease in the future. (Wasson Coal Co. v. Industrial Conz., 312 Ill. 241.) Furthermore, the Workmen's Compensation Act receives a practical and liberal construction, particularly in determining questions of dependency. (Waechter v. Industrial Com., 367 Ill. 256.) This being so, courts should not interfere with the finding of the Industrial Commission on fact questions relative to the exist-*

*ence and extent of dependency, if there be evidence to sustain the finding. France Stone Co.* **v.** *Industrial Com.,* **369 Ill. 238;** *General Construction* **Co. v.** *Industrial Com.,* **314 Ill. 58;** *Novak.* **v.** *Indnstrial Cona.,* **339 Ill. 292.**

*Plaintiffs in error have never contended that 'they were entirely dependent upon their son's earnings, their contention being, instead, that they were partially dependent. at the time of William LaTour's death. upon his contributions to them. A child contributes to the support of his parents, within the purview of the Workmen's Compensation Act, when he contributes a substantial sum to the support of the family, although this sum is less than the actual cost of his support and maintenance where the child is a minor or is in a position to demand legal support, (is here, from his parents. (Chioago, Wilmington & Franklin Coal Co.* **v.** *Industrial Com.,* **303 Ill. 540.)** *As pertinently stated in General Construction Co.* v. *Industrial Com.,* **314 Ill. 58,** *'The parents' income, their mode* of *living and the application of the boy's earnings, at least partially, to the maintenance of the home were of such a character as to justify an award on the ground of partial dependency. Partial dependency may exist even though the claimant could have subsisted without the decedent's contributions. The test is whether the contributions were relied .on by the dependent for his means* of *living as determined* by *his position in life.' Peterson* **v.** *Industrial Com.,* **331 Ill. 254,** *is to the same effect."*

Applying the principle of law above quoted to the facts present in the record before us we find that.. the son, Robert B. Zimmerman, Jr., was partially dependent on his mother, Mary Faye Zimmerman, for support at the time of her death. However, we are unable to determine with any degree of accuracy the percentage of such dependency. As the burden of proving this is upon the claimant, we must necessarily restrict any award to the minimum amount allowed under Secticn 7 (c), or One Thousand Dollars, increased by thirty **(30)** per cent under Section 7 **(1)** to. Thirteen Hundred Dollars.

The record also shows that claimant, Robert B. Zimmerman, the father, paid $119.50 to St. John's Hospital, $90.00 to the. Springfield Clinic for medical services, and $10.00 to Kirlin & Egan for ambulance service, a total of $219.50, all necessarily incurred as a result of the injuries sustained by decedent from the accident in ques-

tion. The evidence also shows that Mrs. Edna Zimmerman. Supervisor in Charge of the Division of Child Welfare, where the decedent was employed, visited the hospital within twenty-four hours after the accident and assured claimant that respondent would pay the hospital and doctor bills; and we find that claimant is entitled to be reimbursed for the amount expended of $219.50.

Respondent paid decedent a salary of $180.00 per month, or on the basis of $2,160.00 per year, which was the annual earnings paid persons employed in the same class. Under Section 10 (c), the compensation rate would be $15.00 per week, which must be increased thirty (30) per cent or to $19.50, the accident having occurred subsequent to July 1,1947.

An award is therefore made to Robert B. Zimmerman in the sum of $219.50 for hospital and medical bills, which is payable forthwith.

An award is also made to Robert B. Zimmerman. for the use and benefit of his son, Robert B. Zimmerman, Jr., in the sum of $1,300.00 payable as follows:

$507.00, which has accrued, is payable forthwith; and
$793.00, shall be payable in weekly installments of $19.50 commencing April 28, 1948 and continuing for 40 weeks, with a final payment **of** $13.00.

Hugo Antonacci, Court Reporter, charged $30.00 for taking and transcribing the testimony. We find the amount charged is fair, reasonable and customary, and should be allowed.

An award is therefore made to Hugo Antonacci, 502 Illinois National Bank Building, Springfield, Illinois, in the sum of $30.00.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4052—Claimant awarded $2,121.60.)

JEANNETTE FESSER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April 20, 1948.*

DAN MCGLYNN, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent

WORKMEN'S COMPENSATION ACT—*laboratory technician at Alton State Hospital within provision of—when an award may be made under Act for temporary total disability and permanent partial loss of use of hand.* Where a laboratory technician at the Alton State Hospital, sustains accidental injuries, arising out of and in the course of her employment, resulting in temporary total disability and permanent partial loss of use of her right hand, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by said employee with the terms thereof, and proper proof of claim for same.

ECKERT, C. J.

On August 6, 1947, the claimant, Jeannette Fesser, an employee of the respondent in the Department of Public Welfare at the Alton State Hospital, while working as a laboratory technician, sustained a fracture of her right wrist when a dry sterilizer exploded. At the time of the injury claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant seeks an award for twenty-five weeks temporary total disability, for the permanent loss of use of her right hand, and for medical services amounting to $75 00 Since claimant was temporarily totally disabled only from August 6,1947 to October 1,1947, and since her wages for unproductive time during August and September 1947 equal the compensation to which she would

otheiwise be entitled, no award can be macle for tempc· rary total disability. Likewise no award can be made for the $75.00 medical bill of Dr. John Patrick Murphy, since claimant elected to secure his services at her own expense.

From the testimony of Dr. Murphy, who examined claimant on October 20, 1947, and from the report of Commissioner Jenkins, who made a personal examination of claimant's right hand and wrist, the court finds that claimant has sustained a sixty per cent loss of use of her right hand. She is, therefore, entitled to 50% of her average weekly wage for 102 weeks. Since claimant's annual salary was $1,680.00, and since claimant had two children under sixteen years of age dependent upon her for support at the time of the accident, her compensation rate is $16.00 per week. The injury having occurred subsequent to July 1, 1947 this must be increased 30% or $4.80, making a compensation rate of $20.80 per week.

. An award is therefore entered in favor of the claimant, Jeannette Fesser, in the amount of $2,121.60, to be paid to her as follows:

$ 603.20, accrued, is payable forthwith;
$1,518.40, is payable in weekly installments of $20.80 per week beginning April 21, 1948, for a period of 73 weeks.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

Henry P. Keefe was employed to take and transcribe the evidence at the hearing before Commissioner Jenkins. Charges in the amount of $15.65 were incurred for these services, which charges are fair, reasonable, and customary.

An award is therefore made in favor of Henry P. Keefe in the amount of $15.65, payable forthwith.

(No. 4053—Claimant awarded $934.88.)

ALDEN MESSERSMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed April* 20, *1948.*

HARRY C. HEYL, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award may be made for temporary total disability—permanent partial loss of use* of *foot.* Where an employee as a laborer in the Department of Public Works and Buildings, Division of Highways, received accidental injuries arising out of and in the course of his employment, resulting in temporary total disability and permanent partial loss **of** use of his left foot, an award may be made for compensation therefor, in acoordance with the provisions of the Act, upon compliance by said employee with the terms thereof and proper proof of claim for same.

ECKERT, C. J.

On May **13,** 1947, the claimant, Alden Messersmith, employed by the respondent as a laborer in the Department of Public Works and Buildings, Division of Highways, while flagging traffic on S.B.I. Rt. 88, Peoria County, Illinois, mas struck by an endloader and knocked to the pavement. One of the wheels of the endloader ran over his left foot and onto his left chest and shoulder before the endloader was stopped.' Claimant was immediately taken by ambulance to St. Francis Hospital in Peoria and placed under the care of Dr. Hugh Cooper.

The following day, Dr. Cooper reported that claimant had sustained multiple fractures in his left foot and ankle; contusion of his chest and left shoulder; and subconjunctival hemorrhage due to the crushing of the chest. On June 19th Dr. Cooper further reported that the injuries of the shoulder and chest were relatively simple and had healed without disability; that claimant had multiple fractures in his left foot, with a dislocation of

the cuboid bone ; that on May 19th a closed reduction of the tarsal fractures was done, traction pins were put through all the toes, and elastic-traction was applied with the foot in a corrective cast; that pins were also placed through the lower end of the tibia and the oscalcis to gain fixed traction.

Claimant left the hospital on May 28th, 1947, but returned on June 10th for removal of the elastic-traction. He returned home immediately. On August 26, 1947 claimant again reported to Dr. Cooper who found the fracture in the fibula then completely healed in good alignment, the fractures of the metatarsal bones healed in good alignment, and considerable comminution of the fragments at the calcan-ocuboid joint. He stated that claimant was not yet able to return to work.

On November 5, 1947 Dr. Cooper submitted his final report as follows:

"Mr. Alden Messersmith was brought to me at the St. Francis Hospital on May **13, 1947** with severe fractures and contusions about the body. The shoulder and chest lesions have cleared up without any disability. The fracture of the left fibula has healed solidly and in satisfactory alignment. The left foot was the site of the chief damage. It had fractures of the distal ends of the shafts of the second and third metatarsals, a fracture of the oscalcis, a dislocation of the cuboid in its relation to the scaphoid and in the relation of the cuboid to the cuneiform bone. The mid-tarsal region is somewhat disorganized so that it is rather difficult to give an accurate statement of the actual displacements.

"A fairly satisfactory reduction of the fractures and dislocations were carried out, and the man has a fairly good walking foot. There is, however, a marked loss of pronation and supination of the sub-astragaloid joint. Healing of the fractures and dislocations has left oonsiderable thickness and rigidity through the tarsal region of the foot. The man is able to do fairly active work, as of my last examination on October 25th, and should get along fairly well. I believe the combination of these fractures has given him approximately *50* per cent permanent loss of function on this foot. No further treatment will be required."

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's

Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the act. The accident arose out of and in the course of the employment.

Claimant was temporarily totally disabled as a result of the injury from May **13, 1947** to October **31, 1947.** Compensation, however, at the rate of **$13.85** per week, and in the aggregate amount of **$338.36** was paid by respondent to claimant, so that claimant has been fully compensated for his temporary total disability. Medical and hospital expenses, in the amount of **$339.60,** have also been fully paid by the respondent.

Claimant, however, has sustained a fifty per cent loss of use of his left foot. At the time of the injury he **had been employed** by .the respondent for less than a month, at a wage rate of **$6.00** per day. He had no minor children dependent upon him for support. Employees engaged in **a** similar capacity worked less than 200 days **per year.** Claimant's compensation rate, based on annual earnings of **$1,200.00** is, therefore, **$13.85** per week. For a fifty per cent permanent loss of use of his left foot he is entitled to **$13.85** a week for a period of 67½ weeks, **or** the total sum of **$934.88.**

The record discloses that Mary **I.** Reynolds has submitted a statement of $26.40 for taking and transcribing the testimony before Commissioner Jenkins. This charge is fair and reasonable.

An award is therefore made in favor of the claimant, Alden Messersmith, in the amount of **$934.88** to be paid to him as follows:

**$346.25, accrued, is payable forthwith:**

**$588.63, is payable in weekly installments of $13.85 per week, beginning April 23, 1948 for a period of 42 weeks with** an **additional** final **payment of $6.93.**

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

An award is also entered in favor of Mary I. Reynolds in the amount of $26.40 for taking and transcribing the testimony before Commissioner Jenkins, payable forthwith.

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(No. 4061—Claim denied.)

LAWRENCE H. NEWMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed* ***April 20,*** *1948.*

EDWARD C. MACK AND ANGELL AND GARRETSON, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

NEGLIGENCE—*respondeat superior—doctrine not applicable to State.* In the exercise of governmental functions, the State is not liable for the negligence of its officers, agents or employees, in the absence of a Statute making it so liable, where damages occurred on January 31, 1943 while the Court of Claims Act of 1917 was in full force and effect.

HIGHWAYS—*construction and maintenance of, governmental function.* In the construction of public highways, the State exercises a governmental function, and it is not liable for damages resulting from the negligence of its employees in such construction, or the negligent or wrongful conduct of its officers, agents or employees in connection therewith.

PROPERTY DAMAGE—*alleged to have resulted from negligence* of *employees* of *Btate in construction* of *public highway—State not liable for.* The State is not liable for damages to property alleged to have been caused by the negligence of its employees, officers or agents in the construction of a public highway under the Act in force at time of occurrence.

DAMRON, J.

The original complaint in this case was filed on January 12,1948; thereafter an amended complaint was filed herein on April 7, 1948.

In the amended complaint, claimant alleges that he has been damaged in a sum in excess of $2,500.00 due to the negligence of the respondent, through its agents, servants, or employees.' The alleged damages are founded upon personal injuries and property damages sustained by the claimant, Lawrence H. Newman, in an automobile accident on State Bond Issue Route No. 10 near Hamilton, Illinois. The accident is alleged to have occurred on January 31, 1943 at about 2:30 A. M. at which time claimant alleges he was driving his automobile in an easterly direction about one mile east of Hamilton, Illinois, on said Route 10. That said highway was in a state of construction, the shoulders not having been filled in left a drop of 14½ inches from the edge of the slab, into which the right wheels of his automobile fell causing it to turn over.

Claimant charges that the failure to place warning signs or markers along said drop-off at the edge of said highway constitutes negligence on the part of the respondent. The amended complaint further alleges that at the time and place of said accident the claimant was in the exercise of due care and caution for his own safety.

This claim occurred January 31, 1943 while the Court of Claims Act of 1917 was in full force and effect and it must be decided on that statute.

The case of *Turner et al.* vs. *State,* **12** C.C.R. 265, involved a case somewhat parallel upon the facts of the case at bar.

About 7:30 P. M. of October 5, 1940 on State Route 39, between Mahomet and Champaign, Illinois, a collision occurred between cars driven by claimant Turner and one McCleary. A six inch depression in the concrete pavement, which had existed for more than. three weeks prior to the accident and of which the State had notice,

caused the Turner car to swerve to the right and then to the left across the black line in the center of the highway. It crashed into the oncoming McCleary car. There was no sign, no barricade, no light to warn motorists of this defect in the pavement.

A claim was filed based on the negligence of the agents and servants of the respondent seeking awards amounting to $23,000.00.

In denying an award this Court held that the State exercises a governmental function in the construction and maintenance of public highways and it is not liable for damages caused by either a defect in the construction, or failure to maintain same in a safe condition for travel.

Following the Court of Claims Act as it existed until repealed in July 1945, we held that awards are limited to cases in which claimant would be entitled to redress against the State either at law or in equity if the State were suable. The Court quoted *Crabtree* vs. *State*, 7 C.C.R., *207,* and held that the doctrine of respondeat superior had no application to the State in the exercise of its governmental functions. *Kelly* vs. *State*, 9 C.C.R., 339

All claims for damages based on the alleged negligence of State employees prior to July 1, 1945 are controlled by the Turner case. Prior to the enactment of the present Court of Claims Act, claimants could not recover an award based on the negligent act of the agents or servants of the State.

The respondent, through its Attorney General, files a motion to strike and dismiss said complaints for the reason that any possible cause of action upon the facts alleged is barred by the statute of limitations contained in Section 22 of the Court of Claims Act (1945).

In view of the position we take regarding the laws applicable to the claim, the motion of the Attorney General need not be considered.

Award denied.

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*(No.* 4057—Claimant awarded $2,500.00.)

MARINE TRANSIT COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed May 11, 1948.*

SEAGO, PIPIN, BRADLEY AND VETTER, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

NEGLIGENCE—*failure of bridge tender to foresee the consequences in attempting to close bridge before safe clearance of tugboat on stream.* Where bridge tender fails to foresee the consequences which would follow, was negligent in attempting to close the bridge before the tugboat had a reasonable opportunity to pass beyond and safely clear the arc of the closing bridge structure.

DAMAGES—*maximum allowed.* Claimant cannot recover more than $2,500.00 which is the maximum sum this court can allow in such cases.

ECKERT, C. J.

On October 12, 1947 the claimant, Marine Transit Company, a corporation qualified and doing business in Illinois, was in the exclusive possession as charterer of the diesel towboat "A. L. Nash", which it operated in its business as a common carrier barge line on the Illinois River and Waterway. Under the terms of its charter agreement, the claimant was responsible for the maintenance and repair of the boat.

About 11:45 that morning, the towboat, with a barge, was proceeding upstream in a northerly direction. As it approached the Ninth Street Bridge at Lockport, Illinois, across the Illinois Waterway, the bridge was open. Before the towboat could complete its passage through the opening, however, the bridge swung backward toward

its closed position, striking and damaging the towboat. The bridge was maintained, operated, owned, and controlled by the respondent. The following is a statement of the accident made by Arthur G. Stander, Bridge Engineer of the Department of Public Works and Buildings:

"On October 12, 1947, at 11:40 A. M. two private cruisers and the towboat A. L. Nash with one barge of gravel, traveling upstream, signaled for an opening of the Ninth Street Bridge in Lockport. The bridge was swung upstream, that is, the east end of the bridge traveled north and came to a stop when it was parallel to the stream. The bridge tender completed the operation of opening the bridge. A submarine was docked about 1,500 feet north of the bridge on the east bank of the channel adjacent to what is known as the Butterfly Dam.

"The navigable channel at the Ninth Street Bridge is to the east of the center pier of the bridge, and due to the fact that the submarine was occupying the channel to the east of the dam it was necessary for a ship traveling upstream to cut across the channel from the east side to the west side to negotiate the Butterfly Dam. When the towboat A. L. Nash with barge of gravel was apparently clear of the bridge the bridge tender began to close the bridge, but as he had misjudged the location of the towboat, the bridge struck the after port quarters of the towboat."

On the hearing before Commissioner Blumenthal, Ben Suva, the bridge tender on duty when the accident occurred, testified that two cruisers came upstream preceding the "A. L. Nash"; that he opened the bridge to allow them to pass, and thinking the towboat would be clear, started to close the bridge; that the towboat, however, swung to the west, and foreseeing the risk of a collision, he went to the control room to shut off the power; that the wind blew the power house door shut, thereby delaying him, with the result that the bridge crashed against the boat.

On cross-examination, Suva stated that he started to close the bridge before the towboat was clear. He admitted that there was no fault on the part of the "A. L. Nash". He stated that when the bridge is swung upstream only a part of a passing tow can be seen from

inside the power control house, and to get a clear view, the bridge tender must go about ten feet outside on the roadway of the bridge on the opposite side of the control room. He further testified that his attention was diverted to the highway by the tooting of horns of automobiles waiting to cross the bridge.

The court finds that the collision of the bridge structure with claimant's towboat, and the damage thereto, was caused by the negligence of the bridge tender in charge of the bridge. He knew that the control mechanism was so housed that it might be necessary to step out on to the bridge deck to have an unobstructed view of the entire vessel passing through the open draw. He also knew, or in the exercise of ordihary care should have known, that the presence of the surfaced submarine on the east bank about 1,500 feet upstream 'of the bridge would necessitate a vessel travelling upstream to sheer towards the west across the channel and take such a course the towboat actually took. He should'have foreseen the consequences which followed and was negligent in attempting to close the bridge before the towboat had a reasonable opportunity to pass beyond and safely clear the arc of the closing bridge structure.

Such acts of bridge tenders in operating draw bridges constitute negligence. *Lehigh Valley Trans. Co.* vs. *Chicago,* 237 Ill. 581. The fact that the bridge tender was harassed by the persistent clamor of automobile horns sounded by impatient and irritable motorists delayed for a few minutes on the highway constitutes no excuse in endangering a vessel by imprudently hastening to close the bridge. The right of a vessel properly navigating a waterway to proceed safely on its course is paramount to that of motorists on the land highway.

As a result of this negligence the deck house of the

towboat, "A. L. Nash" was badly bent and crumpled, steel plating was buckled, stanchions, deck rail, scuppers, pipes and interior sheathing and stove canopy were broken, two steel cables were broken and required renewal, and other incidental damage occurred. To repair and rehabilitate the towboat the claimant paid the following charges: To Calumet Shipyard & Drydock Company for labor and materials $1,905.67, to Upson-Walton Co for two steel cables, $91.41, to Walker & Noonan, marine surveyors, for survey and preparation of reports, $81.00. Claimant also has established as a reasonable charge for loss of use of the towboat pending repairs the sum of $700.00, making total damages sustained by the claimant in the amount of $2,778.08.

An award is therefore made to claimant, The Marine Transit Company, in the sum of $2,500.00, the maximum which this court can allow in such cases.

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**(No.** 4062—Claimant awarded $4,875.00.)

MINNIE AYERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed May 11, 1948.*

FRANK M. OZINGA, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*total dependency—collateral* **heir.** Death of employee from injuries within provisions of Act and claimant a sister of deceased employee having proven total dependency for seven years prior to death of deceased employee and having further shown that deceased employee contributed total support to claimant, and that claimant relied upon such contributions at time **of** death for her means of livelihood and that the injuries sustained caused the death of employee, arising out **of** and in the course of his employment within the meaning of the Act and having complied with all provisions and terms thereof is entitled to an award under Section 7, Paragraph "D" of Act.

DAMRON, J.

This complaint was filed on January 16, 1948 by Minnie Ayers, sister of Walter F. Schultz, deceased, for an award under the Workmen's Compensation Act.

The record consists of the complaint, departmental report, transcript of evidence, waiver of claimant's brief, waiver of respondent's brief, commissioner's report and reporter's bill.

It was stipulated between claimant and respondent by their respective attorneys, upon the hearing on April 2, 1948 before the Commissioner, that the Departmental Report of the Division of Highways, Department of Public Works and Buildings, filed herein on February 11, 1948 would constitute the record in this cause as to the facts set forth therein.

It appears from the Departmental Report that Walter F. Schultz on November 12, 1947 was 52 years of age and unmarried. The deceased was regularly employed by the Division of Highways from May 22, 1942 to the date of his death. On the latter date he was classified as foreman, at a salary of $220.00 a month and for the year preceding his death his earnings totaled $2,856.00.

Early on the afternoon of November 12, 1947 the deceased left the Division Highway garage in Oak Forest, Illinois, in a State owned automobile for the purpose of inspecting the work of various maintenance groups. While driving south on Crawford Avenue across the intersection of 167th Street his automobile collided with the automobile of one Thomas Kalina traveling west on 167th Street. The decedent was thrown from the automobile by the impact and sustained a fracture of the skull and other serious injuries. He was taken to the Oak Forest Infirmary where he died a few hours later.

No jurisdictional question is presented for determination, the parties were operating under the Workmen's Compensation Act and the injuries resulting in the death arose out of and in the course of decedent's employment.

The claimant, Minnie Ayers, sister of the deceased, testified on her own behalf that she had resided with her brother, Walter Schultz, at his home for about seven years preceding his death. He paid for all her clothing, food, board and keep. She had been in ill health during this entire period and had no earning capacity. At present she is an invalid. She had been a widow for twenty-four years. No one other than her brother had contributed to her support or livelihood during five years preceding her brother's death; she had no independent means or income of her own; and during this period of seven years and up to the time of his death she was totally dependent upon the deceased. This evidence was uncontradicted.

It is provided by Section 7 (d) of the Workmen's Compensation Act that where no amount is payable under paragraphs (a), (b), or (c) to a surviving spouse, child or children or parent and the employee leaves collateral heir dependent at the time of the accident to the employee upon his earnings to the extent of fifty per centum or more of total dependency then the amount of compensation shall be such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not more than $3,750.

It is also provided in Section 7 (l) of the Act that where death occurs to an employee as a result of an accidental injury sustained to an employee on or after July 1, 1947, compensation as provided in paragraphs (a),

(b), (c), (d) and (h) of this section shall be computed according to the provisions of this section exclusive of this paragraph, and after so computed shall be increased thirty per centum (30%).

From a careful consideration of this record we find that claimant, Minnie Ayers, at the time of the accident was a collateral heir of Walter F. Schultz, deceased, and was wholly dependent upon him for support and is entitled to an award as provided by Section 7 (d) and (1) of the Workmen's Compensation Act. We further find from the evidence that deceased at the time of the accident which resulted in his death, earned the sum of $2,856.00 for the year preceding the accident; that his average meekly wage amounted to the sum of $50.76, making his compensation rate amount to the sum of $19.50.

An award is hereby entered in favor of Minnie Ayers in the sum of $4,875.00. Of this amount the sum of $507.00 has accrued as of May 12, 1948. The balance of said award is payable to her at $19.50 each week for **224** weeks commencing May 19, 1948.

Future payments of this award being subject to the terms of the Workmen's Compensation Act, including right of subrogation to which respondent might be entitled under Section 29 of the Act, jurisdiction is hereby retained for the purpose of making such future orders as may be necessary in this cause.

The record discloses that **A.** M. Rothbart and associates court reporting services was employed to report and transcribe the evidence in support of this claim, making a charge therefor in the sum of $16.80. We find these charges to be fair, reasonable and customary in the community where the services were rendered.

An award is therefore entered in the sum of $16.80

for the use of A. M. Rothbart and associates court reporting service.

This award is subject to the approval of the Governor as provided in Section *3* of "An Act concerning the payment of compensation awards to State employees."

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(No. 4066—Claim denied.)

HARRY J. DOMIANUS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed* Yay *11, 1948.*

EDWARD R. FARRAR, for, Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*Statute* of *Limitation.* Where claimant's cause **of** action is barred by the Statutory Limitations contained in Section **24** of the Workmen's Compensation Act, this Court has repeatedly held that it has no jurisdiction to hear a claim under the provisions of said Act where the claimant fails to **file** his claim within the time set by Section **24** of said Act.

*Stuenkel* **vs.** *State,* 16 C.C.R. **34.**

**BERGSTROM, J.**

Claimant, Harry J. Domianus, filed his complaint on January 22, 1948 for compensation under the provisions of the Workmen's Compensation Act of this State for injuries sustained between May 25, 1946 and June 5, 1946 while in the course of his employment with the Division of Highways of the State of Illinois.

The complaint shows on its face that no compensation was paid to claimant and that respondent did not furnish any medical, surgical and hospital treatment. The complaint also shows on its face that approximately one year and eight months elapsed between the date of the injury and the filing of the complaint.

The Attorney General filed a motion to dismiss for the reason that the cause of action is barred by the statu-

tory limitation contained in Sec. 24 of the Workmen's Compensation Act. This court has repeatedly held that it has no jurisdiction to hear a claim under the provisions of the Workmen's Compensation Act where the claimant fails to file his claim within the time set by Sec. 24 of said Act. *Stuenkel* v. *State,* 16 C.C.R. **34;** *Stallard* v. *State,* 16 C.C.R. *78; Bemmer* v. *State,* 16 C.C.R. 104; *Britt* v. *State,* 16 C.C.R. 114; *Rathje* v. *State,* 16 C.C.R. **177;** *Clifton* v. *State,* 16 C.C.R. 298.

For the reasons stated, the motion of the Attorney General to dismiss the complaint is hereby allowed.

Complaint dismissed.

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(No. 4060—Claimant awarded **$1,313.31.**)

FRANK H. BREED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed June 10, 1948.*

JOHN R. KINLEY, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for Respondent.

*WORKMEN'S* COMPENSATION ACT—*when recovery* **may** *be had for permanent partial* **loss** *of and complete* **loss** *of use* **of** *right leg.* When an employee **of** the Department of Public Works and Buildings, Division **of** Highways, sustains injuries arising out of and in the course **of** his employment, while engaged in hazardous employment, resulting in permanent partial and complete loss of use of his right leg, **an** award may be made for compensation therefor, in accordance with the provisions **of** the Act upon compliance with the terms thereof and proper proof **of** claim.

BERGSTROM, **J.**

Claimant, Frank Breed, filed his claim January **9,** 1948 for compensation for compl'ete and permanent disability, including pension, under the provisions of the Workmen's Compensation Act.

Claimant was employed by respondent in the Department of Public Works and Buildings, Division of

Highways, as a common laborer. On September 6, 1946, while so employed, he was one of a group of men assigned to pavement center striping operations on S. B. I. Route 2 in Winnebago County. Following the luncheon period that day the group and its equipment, a Walters cab-over-engine truck and a center striping machine, were driven to the southern limits of Rockton where the afternoon's work began. Claimant was riding in the cab of the truck. The truck was proceeding down the highway a short distance ahead of the striping machine to serve as a warning to traffic and protection to the striping machine. At approximately 1 P.M. the truck reached its position and reduced speed to approximately ten miles an hour. Claimant jumped from the moving truck to the pavement, and in doing so he stumbled and fell, suffering fractures of the right hip joint. He was then removed to his home in Durand, and the group foreman called Dr. C. A. Sattler of Drs. Robert McCulley and C. A. Sattler, Associates, Pecatonica. They then removed claimant by ambulance to Deaconess Hospital at Freeport. Claimant remained in the Deaconess Hospital until December 8, 1946, and was under observation and treatment until February 25, 1948. On March 2, 1948, Dr. McCulley submitted his final report with respect to claimant's 'condition, to the Division of Highways, as follows:

"Intertrochanteric fracture of the right femur. Treatment—A double Kirschner wire was placed in the lower end of the right femur. Patient was placed on Albee table and a double spica cast applied about the hip girdle and extending to both knees. The right femur was held in a position of external rotation and abduction by this procedure. This was carried out under general anesthesia, X-rays—Intertrochanteric of the right femur. Remarks—Walking caliper applied to right leg on February 18, 1947. Date patient was discharged—Feb. 25, 1948. Permanent disability—Permanently unable to return to manual labor."

We find that at the time of the accident the employer and employee were operating under the provisions of the

Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. We also find that the accident arose out of and in the course of claimant's employment.

Claimant had no children under sixteen years of age dependent on him for support, and his earnings from the Division of Highways in the year preceding his injuries totaled $841.50. His wage rate was 75c per hour and he earned $6.00 per day, based on an eight-hour day. Employees engaged in a capacity similar to that of claimant ordinarily worked less than 200 days a year, so that his compensation rate would be computed under Section 10, Par. (e) of the Workmen's Compensation Act. This would be $11.54 per week, increased by 20% or to $13.85 per week, the accident having occurred after July 1, 1945.

Claimant was paid compensation for total temporary disability in the amount of $1,151.99, based on 64 weeks at $18.00 per week, for the period from September 7, 1946 to and including November 29, 1947. He should have been paid on the basis of $13.85 per week; or a total of $886.40, so that he has been overpaid the amount of $265.59 for total temporary disability. Respondent also paid the sum of $953.31 for medical, hospital and ambulance service.

With respect to the permanent extent of claimant's injuries, Dr. McCulley testified on May 1, 1948, that he examined claimant on April 30, 1948, and that such examination disclosed the following facts with respect to claimant's condition;

"He had half an inch of shortening of the right leg, which was partially compensated for by having about a quarter inch lift put on the heel and sole of the right shoe. When he is lying on his back there is very marked limitation of rotation of his right hip joint. The rota-

tion is limited to about ten degrees, whereas in the left leg he had seventy-five degrees of rotation. When he is standing this same rotation is limited to about forty-five degrees on the right, whereas he still had a good seventy-five degrees of rotation on the left. There is a little limitation of motion on what we call the straight leg raising test. In other words, flat on his back, his right leg comes up to about seventy degrees and his left leg to eighty degrees. With him on his abdomen, he is able to extend his left leg the normal amount of around twenty degrees, but the right leg will not come back beyond the one hundred eighty degree angle. In other words, it is just right straight down. At all times the right knee is held in mild flexion, and can only be forcibly extended, and it immediately assumes its partially flexed position. I estimated the angle there about one hundred seventy degrees as compared with the normal of one hundred eighty. His right knee flexes to an angle of seventy-five degrees with the thigh, whereas the normal, or left side, flexes completely to an angle of only thirty degrees. There is no swelling of the leg and no circulatory disturbance. There is very little, if any, muscle atrophy."

He further testified that, in his opinion, this condition was permanent. Upon cross examination, when asked the degree of permanency, he considered it approximately sixty to seventy-five per cent loss of use of the right leg. None of his testimony was controverted and, from the record, we are of the opinion that claimant is entitled to an award based on sixty per cent permanent and complete loss of the use of his right leg, which would be computed on the basis of one hundred fourteen weeks at $13.85 a week, or a total of $1,578.90, from which must be deducted the overpayment of $265.59 for total temporary incapacity, leaving him entitled to a net award of $1,313.31.

An award is therefore given to claimant, Frank Breed, in the sum of $1,313.31, to be paid to him as follows:

$387.80 accrued, is payable forthwith;
$925.51 is payable in weekly installments of $13.85 beginning on June 19, 1948, for a period of 66 weeks, with an additional final payment of $11.41.

Alice V. Dickinson, Court Reporter, Court House, Rockford. Illinois, was employed to take and transcribe

the evidence in this case and has rendered a bill in the amount of $24.00. The Court finds the amount charged is fair, reasonable and customary, and an award is hereby made to the said Alice V. Dickinson in the sum of $24.00.

This award is subject to the approval of the Governor, as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

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(No. 4065—Claimant awarded $331.03.)

AUTO ELECTRIC COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinzon filed June 10, 1948.*

CLAIMANT, *Pro Se.*

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

CONTRACT—*when payment for goods, wares and merchandise proper.* Where claimant entered into a contract to supply materials to Respondent at the request of Division of Highways, Department of Public Works and Buildings, and the various items were delivered to the Illinois Highway Garage at Effingham, Illinois, and the prices charged were usual and customary and when the charges were incurred there remained sufficient money in the appropriations from which payment could have been made, claimant may be compensated therefor.

ECKERT, C. J.

The claimant, Auto Electric Company, of Mattoon. Illinois, is engaged in the sale of automotive supplies. From April 14, 1947 to June 23, 1947 the claimant supplied materials to the respondent at the request of the Division of Highways, Department of Public Works and Buildings. The various items were delivered to the Illinois Highway Garage, at Effingham, Illinois.

From the report of the Division of Highways, which forms a part of the record, it appears that the Division has made purchases continuously during the past several years from the claimant. Previously there had been no

difficulty in the scheduling of invoices for payment, but in this instance the original invoices were apparently mislaid by the Division office. The report states that the Division believes the materials were furnished by the claimant as alleged in its complaint, and that the prices charged are the usual, customary, and reasonable prices for such materials and are consistent with prices paid claimant by the Division for the same kind of materials, both before and after this claim accrued. The claim is in the amount of $331.03.

Claimant furnished properly and duly authorized materials to the respondent, for which it has not received payment. . When the charges were incurred there remained a sufficient unexpended balance in the appropriations from which payment could have been made. Claimant submitted its invoices to the respondent within a reasonable time and the non-payment of such invoices is not due to the fault of the claimant. Claimant is therefore entitled to an award. The *Texas Company* vs. *State*, 16 C.C.R. 55.

An award is, therefore, entered in favor of the claimant in the amount of **$331.03.**

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(No. 4070—Claimant awarded $200.04.)

ANTON NOWAK, Claimant, vs. STATE OF ILLINOIS, Respondent.

***Opanion** filed June 10, 1948.*

D. W. JOHNSTON, for Claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when temporary total disability may be allowed—permanent partial loss of use of foot.* Where employee of State sustains accidental injuries arising out of and in the course of his employment, resulting in temporary total disability and permanent partial loss of use of left foot, an award may be made for com-

pensation therefor in accordance with the provisions of the Act, upon compliance with the terms thereof and proper proof of his claim.

SAME—*medical expenses.* Where claimant elected to secure his own physician, under Section 8, Paragraph "A" of Act, this service is not compensable.

BERGSTROM, J.

Claimant, Anton Nowak, filed his complaint on February 2, 1948 for compensation under the provisions of the Workmen's Compensation Act,.

The record before us consists of the Complaint, Departmental Report, Transcript of Evidence, Claimant's Waiver of Brief and Respondent's Waiver of Brief.

The evidence, which consists of claimant's testimony, Departmental Report and Report of Dr. George A. Telfer, shows that on January 31, 1947 while claimant was dressing after taking a shower at his place of employment, which was in the State Power Plant at Springfield, Illinois, he was accidentally shoved while sitting on a stool, causing his middle toe to hit the sharp corner of a metal locker-room door, cutting the toe. He worked until February 3, 1947, and on the morning of February 4th noticed his foot was swollen. It was black and there were red streaks going up his leg, and he could not stand on his foot. He then called on three doctors in Springfield, and as they were not in, asked the taxi driver to take him to the power plant. When he arrived at the power plant, which was about 8:30 in the morning, he showed his foot to Earl Johnson, Chief Engineer of the plant, and told him that he was going home to Hillsboro and try to get into the hospital at that place. When he arrived there, he called Dr. George A. Telfer of Hillsboro to his home, who treated claimant's foot until about May 18, 1947.

Claimant further testified, on April 15, 1948, at the time of the hearing before the Commissioner, that the

condition of his foot was such that he was unable to do any hard work, and that about four hours is all he can stand on it after which his foot starts running across the joints and his ankle swells. He also testified that he is unable to wear new shoes without first cutting them, and that he has not worked since the day of his injury due to the condition of his injured foot.

At the time of the accident, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of claimant's employment.

Claimant's earnings for the year immediately preceding the injury were $2,799.84. His compensation rate therefore, is $15.00 per week, which must be increased 20% or to $18.00 per week, the accident having occurred after July 1, 1945. Claimant was paid $699.96 by respondent for unproductive time. He was married and had no children under 16 years of age.

Commissioner Jenkins, who heard the evidence in this matter, personally viewed the foot at the time of the hearing, April 15, 1948, and made the observation that the left foot was swollen, somewhat discolored; that the third toe, counting the large toe as No. 1, is discolored and has an apparent stiffness, and that under the foot of the toe described there is an apparent thickening. He recommended an award based on 52 weeks temporary total disability, and a 20% loss of use of the left foot. The record is not very clear with respect to the extent of claimant's temporary total disability, inasmuch as the doctor's report is silent on this matter. Claimant testified that he has not worked anywhere since the injury. He also testified that his foot finally healed on

July 10, 1947, and the record justifies the conclusion that although he was probably incapable of doing hard work like that of a coal passer or miner, still his period of temporary total disability ceased on or about that date. We concur in the findings of the Commissioner, except that; the period of temporary total disability is **23** weeks instead of 52 weeks.

An award is therefore made to claimant, Anton Nowak, for temporary total disability in the sum of $414.00 based on **23** weeks at $18.00 per week, and a further sum of $486.00 for 20% total loss of the use of the left foot based on 27 weeks at $18.00 per week, or a total award of $900.00, from which must be deducted $699.96 paid claimant for unproductive time, leaving a balance due him of $200.04, all of which has accrued and is payable forthwith in a lump sum.

From the evidence, we must conclude that claimant elected to secure his own physician. Under Sec. 8, Par. (a) of the Act, this service, under such conditions, necessarily must be at his own expense, and an award for medical expense in the sum of $98.00 is hereby denied.

Hugo Antonacci, Court Reporter, 502 Illinois National Bank Building, Springfield, Illinois, was employed to take and transcribe the evidence in this case, and has rendered a bill in the amount of $27.30. The Court finds the amount charged is fair, reasonable and customary, and said claim is hereby allowed.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment of compensation awards to State employees."

(No. 4078—Claimant awarded $728.29.)

JEANNE KRAFT, Claimant, vs. STATE OF ILLINOIS, Respondent.

*Opinion filed June 10, 1948.*

ROY A. PTACIN, for Claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM MORGAN, Assistant Attorney General, for Respondent.

WORKMEN'S COMPENSATION ACT—*when an award may be made for temporary total and permanent partial loss of use of left foot.* Where an employee of the State sustains accidental injuries, arising out of and in the course of her employment while within the provisions of the Workmen's Compensation Act, resulting in temporary total loss and permanent partial loss of use of her left foot, she is entitled to compensation therefor, upon compliance with the requirements thereof and proper proof of her claim.

DAMRON, J.

On October 11, 1947, the above named claimant, while employed as hydrotherapist at the Chicago State Hospital, sustained an accidental injury. The evidence shows that she was employed at the State institution from 3:00 to 11:00 P.M. on said date and while walking from the Diagnostic Building where she was working at about 11:00 P.M. she stepped into a three foot hole along the curb within the grounds of said institution causing her to sustain a comminuted fracture involving the proximal heads of the metatarsal bones of the left foot. She was assisted by two men who lifted her from the hole in the ground there and was taken to the hospital on the grounds where Dr. Fenyes, of the institution, administered first aid. On the following day she was attended by Dr. Louis Olsman, a surgeon connected with the Chicago State Hospital, who had her foot X-rayed, later her foot was placed in a cast.

Due to the injury to her left foot, claimant was temporarily totally disabled from the date of the accident to December 25, 1947.

It is stipulated by and between the parties, hereto, that her gross earnings for the year next preceding the injury were $2,216.29; that the accidental injury arose out of and in the course of her employment by respondent on the premises of Chicago State Hospital; that first aid and medical aid were furnished by the respondent. The claimant was paid for the month of October 1947, $210.00; for November 1947, $140.00; and for December 1947, $127.36 for unproductive work. It is further stipulated by and between the parties, hereto, that claimant at the time of the injury was forty years of age and was the mother of two minor children, namely Donald Kraft, age fourteen years, and Paul Kraft, age twelve years.

Dr. Albert C. Field was called on behalf of the claimant and testified that he examined her on February 24, 1948 and found her left foot was somewhat enlarged by the flattening of both arches; X-rays disclosed a healed fracture of second and third metatarsal with an irregularity in the distal end of the first metatarsal and at the posterior border of the oscalcis. That in his opinion, claimant had a disability of thirty-five per cent of the left foot which condition was permanent.

Dr. Louis Olsman, surgeon of the Chicago State Hospital staff, was called as witness on behalf of the respondent and testified that he examined claimant on the day following her admission to the hospital, October 12, 1947, and thereafter treated her; that X-rays indicated a comminuted simple fracture involving the proximal heads of the metatarsal bones of the left foot. He expressed an opinion that there was a good probability that she would have a certain degree of discomfort and limitation and in view of her obesity and a pre-existing osteo-arthritis agreed that Dr. Field's opinion as to loss of use of her left foot was reasonable.

The commissioner who heard the testimony files his report and agrees that there is a permanent partial loss of use of claimant's left foot of thirty-five per cent.

Claimant testified that she experiences pain across the arch of her left foot since the injury; that it is deformed in that it has a lump across the instep which prevents her from wearing certain type of shoes. That when she is on-duty for eight hours and after she has been on her feet a couple hours that the foot starts bothering her by experiencing pain and that it aches. She further testified that she is unable to wear an ordinary house slipper on the left foot and that she has a limp when she walks.

On the basis of this record we make the following finding: That at the time of the accident, on October 11, 1947, the claimant and respondent were operating under the Workmen's Compensation Act and that claimant is entitled to benefits arising therein. That the respondent had actual notice of the accident as required by Section 24 of said Act, that all medical, and hospitalization was furnished by the respondent. That the claimant's injury arose out of and in the course of her employment. That at the time of the injury, claimant was forty years of age and was the mother of two dependent, minor children under the age of sixteen years. That her weekly compensation rate is $20.80; that she was temporarily totally disabled from the date of the injury to the 25th day of December 1947, amounting to 10 5/7 weeks amounting to the sum of $222.85; that she has suffered a thirty-five per cent permanent partial loss of use of her left foot for which she is entitled to 47¼ weeks at $20 80 a week, amounting to the sum of $982.80, making a total award of $1,205.65.

The record discloses that from the date of the injury

to the 26th day of December 1947, the respondent paid to claimant the sum of $477.36 salary for unproductive time during her disability which must be deducted from the above sum, leaving a net award of $728.29 all of which has accrued and is payable forthwith.

An award is therefore hereby entered in favor of claimant Jeanne Kraft in the sum of $728.29, payable in a lump sum forthwith, as provided under Section 8 (e) of the Workmen's Compensation Act.

A. M. Rothbart, Court Reporting Service of Chicago, was employed to take and transcribe the evidence in this case, and has rendered a bill in the amount of $45.00. The Court finds the amount charged is fair, reasonable' and customary.

An award is hereby entered in favor of **A.** M. Rothbart, Court Reporting Service of Chicago, in the sum of $45.00.

This award is subject to the approval of the Governor as provided in Section **3** of "An Act concerning the payment **of** compensation awards to State employees''.

## CASES IN WHICH ORDERS OF DISMISSAL WERE ENTERED WITHOUT OPINION

2326 **R. P. Devine**
2505 **The J. R. Feigel Co.**
2758 **Frank C. Feutz**
3909 **Robert Parker**
4020 **Lucille Casstevens**
4021 **Arminta Cooper**
4036 **Etna Sandford**
4055 **Anthony J.** Paterno

# INDEX


PAGE

ABUTTING OWNERS — See DAMAGES

APPROPRIATIONS — See SUPPLIES, SERVICES

When claim for goods, wares and merchandise sold to State and at time, the contract price and wares furnished were fair, just and money in appropriation fund **202**

ASSIGNMENTS

Claim against State for money due is assignable, and where one makes a valid assignment thereof, the same is compensable ..... **1**

Rights of assignee of a valid claini by a Corporation shall have right to present claim, after dissolution of said Corporation, within statutory period. ..... **1**

BURDEN OF PROOF — See EVIDENCE

CONSTITUTION

*Acts of* Governor — in obstruction to the performance of a particular contract, resulting from its public and general acts, as a sovereign, not impairment of contractual obligation **in** violation of Art. **11**, Sec. **14** of Constitution of Illinois.. ..... 99

Department of Public Works and Building; its director appointed by Governor; it is essential division or arm of Executive Department; Article V, Sec. 6. Illinois Constitution provides supreme executjve power vested in the Governor, "Who shall take care the laws be faithfully carried out". ..... 99

CONTRACTS

Failure of State to perform obligation (furnish cement) under Contract, resulting in claimant thereby being unreasonably delayed in his performance and causing him to be deprived of the use of his equipment, during period of delay — suffered damages by reason of the Governor's refusal to pay exorbitant prices for cement. .... 99

PAGE

Failure by State to pay exorbitant prices for cement, causing delay to claimant resulting in damages; State not liable; Public Policy. ..... 99

Acceptance of final payment prevents Contractor from recovery of damages under Section 9, Article **0.7** under Standard Specifications for Road and Bridge Construction Act ..... **138**

Payment—for goods, wares and material furnished to State when same is compensable. ..... **202**

CORPORATION

The rights of a assignee of a valid claim made by a Corporation at a time when it is duly existing under its Charter shall have the right to present such claim against the State after dissolution of such Corporation, within the Statutory period, from the time the right of action thereon accrued. ..... 1

COURT OF CLAIMS—See JURISDICTION

Court of Claims cannot sit in review in a collateral attack upon the appointment of a receiver by a Court of Competent Jurisdiction. Richards vs. People, -81 Ill. 551; Commercial National Bank vs. Burch, **141** Ill. 519 **(527)**; Vandalia vs. St. L. etc. Ry. Company, 209 Ill. **72-82** ..... 1

DAMAGES

***To*** *recover damages;* as a result from construction of the new dam at McHenry, Illinois, claimant must establish her case by a preponderance of the evidence. ..... **23**

*Highway* Improvement—resulting in damage to private property; sustains an award for proven damages. ..... **30**

Sovereign commonwealth is not liable in damages, in a claim for additional compensation for the State's failure to furnish eement, as against Public Policy. ..... *99*

Damages—claim denied when not filed within two years from time claim accrued pursuant to Sec. **22** of said Act **79**

Under Standard Specifications for Roads and Bridges Construction acceptance of final payment on Contract prevents recovery of damages.. ..... 138

State will take as a guide but not as a fixed rule in determining the reasonable loss sustained by a member of the National Guard of Illinois the provisions under the Workmen's Compensation Act in a claim filed pursuant to the Military and Naval Code of the State of Illinois **27**

PAGE

Pre-existing Disease—Where a person has a pre-existing disease and that disease is aggravated or accelerated in the course of his employment by accidental means it is compensable. Muir vs. State, 14 C.C.R. 191; Marsh vs. Ind. Com., 386 Ill. 11..... 167

State—not liable to respond—in negligence of its officers, agents or employees, while in the exercise of its governmental functions ..... 79

Maximum—allowance in tort claims being $2,500.00, for damages resulting from the negligence of bridge tender, under Act ..... 190

DEPABTNENT OF PUBLIC WORKS AND BUILDINGS

Damages resulting from excessive water in channel and overflow. Section 22 of an Act to create the Court of Claims, does not contain a saving clause in reference to claims that accrued prior to, such enactment and claimant can not maintain his claim for damage to his crop and land ..... 79

EMPLOYER AND EMPLOYEE

Member of Illinois Reserve Militia while on active duty is not an employee of the State; he is rendering the highest degree of service to the State, which it is possible for a citizen to render, and is as an integral a part of State Government as can be found..... 55

EVIDENCE

Workmen's Compensation—Degree of Proof—Subjective Symptoms. Award must be founded upon facts and from inferences therefrom and cannot be based upon conjecture ..... 10

Proof of Negligence—necessary for State Employee to recover under Section 3 of Workmen's Occupational Diseases Act. Marjorie Wheeler vs. State, 12 C.C.R. 254.. 18

*Degree of Proof:*

Claimant must establish her case by a preponderance of the evidence to recover damages to her property from the State resulting from the construction of the dam at McHenry, Illinois ..... 23

*Burden of Proof:*

In order to recover an award it has been held by this Court that the burden is upon claimant to establish his claim by a preponderance of the evidence; his right to compensation cannot be based on speculation, surmise or conjecture; Sprague vs. State, 14 C.C.R. 116; Tinkler vs. State, 11 C.C.R. 55; Muir vs. State, 14 C.C.R. 191. 167

FORMER CASES PAGE

In a claim for damages based upon wrongful acts and omissions of respondent and its agent, respondent can not in the Court of Claims, collaterally attack the appointment of a Receiver or the validity of such appointment, made by a court of Competent Jurisdiction and ask the Court of Claims to sit in review thereon. ..... 1

Where there has been no enlargement of Receivers Power by legislative enactment, they have such rights of action only as were possessed by the Corporation whose estate they administer ..... 1

GOVERNMENTAL FUNCTION — See DAMAGES

Member of the Illinois Reserve Militia while on active duty is not an employee of the State; he is rendering the highest degree of service to the State which it is possible for a citizen to render, and as integral a part of State government as can be found.. ..... 55

State — not liable for damages to property alleged to have been caused by the negligence of its employees in construction of a public highway.. ..... 187

HIGHWAYS — See NEGLIGENCE

ILLINOIS NATIONAL GUARD — See GOVERNMENT FUNCTION

ILLINOIS WATERWAY ACT

To recover for damages resulting from the construction of a dam in McHenry County, claimant must prove her case by preponderance of the evidence. ..... 23

Excessive water in canal and overflow..... 79

JURISDICTION

Collateral attack upon validity of appointment of a receiver of a Corporation cannot be presented to Court of Claims. Richards vs. People, 81 Ill. 551; Commercial National Bank vs. Burch, 141 Ill. 519-527; Vandalia vs. St. L. etc. Ry. Co., 209 Ill. 73-82..... 1

Court of Claims under Section 22 can not render an award on a claim filed more than two years after same is accrued ..... 68

Limitation; under Section 22 of Act, Statute creating liability or cause of action, is derived from the Statute itself ..... 79

Claim — must be filed within provisions of Section 24 of Workmen's Compensation Act. ..... 197

LIMITATIONS — See JURISDICTION PAGE

Assignee creditors of Corporation ought not to be permitted to extend time beyond two year Statutory Limitations in filing claim through medium of receivership. Republic Life Insurance Co. vs. Swigertetal, 135 Ill. 150 (16'7) ; Young vs. Stevenson, 180 Ill. 608 (614). . 1

Right of Assignee to present claim against State when assignment made at time Corporation duly existing under its charter when presented within statutory period ..... 1

*Time for filing claim* for refund of over-payment of taxes is governed by Section *22* of Court of Claims Act, two years ..... 132

Motor fuel tax — Limitations for filing claini for refund, two years ..... 48

Filing of claim for the sale of goods, wares, arid merchandise is barred under Section *22* of this act when filed more than two years after claini accrued. ..... 68

Federal Statute stays our Statute of Limitation under Section *205* ..... 68

Section *22* **of "An** Act to create the Court of Claims'' does not contain a saving clause in reference to claims that accrued prior to such enactment; such liability is necessarily derived from the statute itself.. ..... **79**

MILITARY AND NAVAL CODE OF THE STATE OF ILLINOIS

*Claim* ***for*** *injuries:* the Workmen's .Compensation Act provisions to be taken as a guide but not as a fixed rule in determining what payment would be reasonable for the loss sustained. Hall vs. State, **12** C.C.R. 464 **(467)** **27**

*Damages for the* reaovery *of private* property of a member of the Militia, damages while used in maneuvers of the Air Wing of the Illinois Reserve Militia are not compensable under Section 8, Par. "C" of the Illinois Court of Claims Act.. ..... 55

Federal Statute niust be regarded as written in our own statutes and therefore is a stay on our Statute of Limitation which required a claimant to file his claim within two years after it first accrued. ..... 68

MOTOR FUEL TAX

Limitation in filing claims for overpayment, two years from time claini accrued referring to Chapter *37,* Section **439.22,** Illinois Revised Statutes 1945, and re-

PAGE

ferred to as Section 22 of the Court of Claim Act in effect July 1, 1945. ..... 48

See this volume Illinois Oil Company vs. State No. 3976 in which same is more fully discussed in said opinion. . 132

NEGLIGENCE — See EQUITY AND GOOD CONSCIENCE

Workmen's Occupational Diseases Act Section 3—*State Employee* must prove negligence to recover under said act ..... 18

Proof — Where claimant alleges negligent treatment of his injury by doctors at Peoria State Hospital he must substantiate the same by proper evidence.. ..... 143

Proximate Cause—Epileptic seizure being an intervening act beyond the control of either claimant or respondent; where claim is made by inmate of a State Institution for receiving burns; when he grabbed a steam pipe during an epileptic attack.. ..... **143**

Respondeat Superior — not applicable to the State, in the esercise of its governmental functions.. ..... 187

Employees — f State in failure to place warning signs or markers on edge of public highway — State not liable for damages resulting therefrom. ..... 187

Bridge Tender — negligence compensable under act and maximum allowance of $2,500.00 under Act. ..... 190

OBJECTIVE SYMPTOMS—See EVIDENCE

PERSONAL INJURY—See DAMAGES, NEGLIGENCE

PRIMA FACIE — See EVIDENCE

PROPERTY DAMAGE — See DAMAGES — NEGLIGENCE

PUBLIC IMPROVEMENTS—See DAMAGES, DEEDS, NEGLIGENCE

RECEIVERS

Power : Receivers have such rights of action only as were possessed by the corporation whose estate they administer. Republic Life Insurance Company vs. Swigertetal, 135 Ill. 150 (167) ; Young vs. Stevenson, 180 Ill. 608 (614). ..... 1

REMEDIES IN COURTS OF GENERAL JURISDICTION — See COURT'S OF GENERAL JURISDICTION

RULES OF COUKT — See JURISDICTION

SALARY PAGE

Vacation—Widow of employee can not claim salary for vacation period where husband did not avail himself of such benefits ..... 152

STATUTES

Federal Statute stays our Statute of Limitations under Section *205* ..... 68

Liability derived from Statute itself, in determining an Act to create the Court of Claims. ..... 79

TAXES

Over Payment—Section 22 limits the time for filing claim for recovery of over payment to two years. ..... 132

WORKMEN'S COMPENSATION ACT

Medical *and* Hospital *Services* under Section 8 Paragraph "A" respondent must furnish same and claimant can not recover upon selecting physicians at his own expense and choosing ..... 10

*Disability* can not rest upon imagination, speculation or conjecture but upon facts established on objective findings ..... 10

Stnte Employee—seeking compensation under the Workmen's Occupational Diseases Act must prove negligence as provided under Section **3** of said act. . . 1(

*Military* and *Naval* Code—Workmen's Compensation Act to be taken as a guide but not a fast rule in determining what payment would be reasonable in **a** claim filed by a member of the National Guard of Illinois. ..... 27

State Employee awarded compensation under act (50% permanent and complete loss of the use of Leg). ..... 32

State *Employee*—Legislature never intended to make an election making employee of the State automatically under the Workmen's Occupational Disease Act. ..... 18

*Compensable* Accident—Nurse employed by Division of Venereal Disease Control and assigned to Cook County Health Department who died as a result of a fire in Hotel LaSalle is within accidental death under act. Miller vs. State 16 C.C.R.; Taylor vs. State 16 C.C.R.. . 34

*Partial Dependency under Section 7 Paragraph "C"* : test is whether contributions were relied on by claimant €or her means of living at time of employee's death. ..... 34

PAGE

*Extent of* Dependency, the percentage is determined not by the amount of the contribution but by the proportion the same bears to the cost of living in the dependent's station of life. Smyth Co. vs. Ind. Com. 306 Ill. 171 and it has been held the Act is to receive a practical and liberal construction Walchter vs. Ind. Com. 367 Ill. *256* ..... 34

Employee of Department of Public Works and Buildings, Division of Highways, entitled to recover. ..... 43

Total and permanent disability justified when employee is disabled completely so far as remunerative employment is concerned ..... 45

Employee of *Conservation* Department : while returning to work, and a front tire of his automobile blew out causing his death, his widow is entitled to an award under Section 7 Paragraph **"A"** of said Act. ..... **50**

*Award* for 50% permanent and partial Loss of use of Little Finger of left hand and 40% permanent and partial loss of use of left leg under Act.. ..... *52*

Employee *of* the *Chicago* State Hospital, an attendant who received an injury to her left hand by being struck on said hand with the heel of a shoe by a patient she was attempting to subdue, awarded **30%** under act. ... 61

neath *of* Employee of 'the Division of Highways, pursuant to his employment compensable under Section 7, Paragraph **"A"** ..... .65, 129

*Death of* Employee, resulting from injuries while within protection of Act, justifies award to dependents upon compliance with requirements of Act and proper proof of claim for compensation. ..... 72

Petition *for rehearing* under Section 19 Paragraph "H" of Act—an award and pension' for life justified under Section 8 Paragraph "F" and computed in accordance with Section 7 Paragraph "A" of the Act.. ..... **74**

Award terminated — Upon showing that claimant is now earning more money than at the time an award was entered for permanent disability, including a pension for life, said award may be terminated under Section 8, Paragraph "F' of Act.. ..... *78*

Partial Dependency — Claimant must show a legal liability on mother's part for support — voluntary contributions by mother for claimant's invalid husband insufficient. . 114

PAGE

Proof—An award must be based upon facts and evidence and cannot rest upon conjecture, speculation or surmise ..... 114

Claim *under Act* must be filed within one year after date of accident where no compensation has been paid or within one year after date of last payment of compensation where any has been paid Section **24** of Act. ..... 117

*Death to* employee of Department of Public Works, from physical exertion widow may recover under Section 7 Paragraph "A" ..... 84

*Death of* employee resulting from injuries while within protection of Act, justifies award to dependents upon compliance with Act and proper proof of claim for Compensation ..... .86, 159. 162

*Right* Leg *and Righ* Arm—permanent partial loss of use of—when award for compensation justified. .....
.....120, 90, **92,** 95, 198

*Death* of Police *Officer* within Workmen's Compensation Act and Compensable under Section 7 Paragraph **"A".** 97

*Left* Eye of employee injured is compensable under Act where proof of 100% loss of use is shown. ..... 123

*Loss of first Phalanx* of middle finger—proof of one-fourth of the distal end of the phalanx, no basis for one-third loss of a finger.. ..... **125**

*Right* Foot—upon proof of 33⅓% loss of use of right foot resulting from accidental injury award justified. ..
.....140, 184, **207**

Leg—partial loss of use of—when award for compensation justified ..... .155, **203**

*Right Leg*—when injury results from accident within the meaning of the Act, claimant entitled to 50% permanent loss of use of right leg. ..... 149

Finger—temporary partial lass of use of—when award for Compensation justified ..... 165

*Pre-Existing Disease*—claimant may recover for aggravated or accelerated pre-existing disease upon establishing his proof by a preponderance of the evidence and no award can be based upon, speculation, surmise or conjecture ..... **167**

*Permanent Total Disability*—denied for failure of proper proof of same.. ..... **167**

Temporary *Total Disability*—where an award justified for

PAGE

Second Finger — third Finger, Partial loss of use. ...172, 175

*Partial Dependency* under Section 7 Paragraph "C" decisive question determining same. ..... 177

*Medical Expenses*—where the Supervisor in charge of the Division of Child Welfare, assures the father of an employee who received accidental injuries of reimbursement for same, an award may be made upon proper proof ..... 177, 203

Haad–Laboratory Technician may recover under act for temporary disability and permanent partial loss of use of right hand ..... 182

*Collateral* Heir — Total Dependency being shown and compliance with provisions and terms of Act, Claimant's sister may be compensated under Section 7 Paragraph "D" of Act ..... 193

Limitation — Section 24 of Act provides claims must be filed within year. ..... 197

WORKMEN'S OCCUPATIONAL DISEASES ACT

'State is *liable* 'under Section 3 but a claim to be compensable must be based on negligence as defined therein. Marjorie Wheeler vs. State, 12 C.C.R. 254.. ..... 18

Intent *of New Act* is substantially the same as old Act and now covers claims to be determined'under the 'substantive provisions of both Acts.. ..... 18

*The* new *Act* merely confirmed its jurisdiction under Section 3 of the said act by express statutory enactment.. 18